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EDITED

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## VOL. V.

Containing the Cases decided by Sir Launcelot Shadwell, Vice-Chancellor, as reported by Mr Simons in the third volume of his Reports: and by Sir John Leach, Master of the Rolls, as reported by Mr Tamlyn in the first volume of his Reports.

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# ENGLISH

# CASES IN CHANCERY.

## BEFORE SIR LANCELOT SHADWELL, VICE-CHANCELLOR OF ENGLAND; AND SIR JOHN LEACH, MASTER OF THE ROLLS.

### Garrard *v.* Lord Lauderdale (*a*).

3 *Simons*, 1.

A conveyance by a debtor, to trusteees for payment of scheduled creditors, who do not execute the deed, or conform to its terms, can not be enforced by the creditors.
December 6, 9, 1330.

BY an indenture dated 22d of June 1822, and expressed to be made between the late Duke of York, of the first part, the defendants, Lord Lauderdale, and B. C. Stephenson, Esq. of the second part, and the several persons whose names were mentioned, in the schedule of the deed, as creditors, of the Duke, in the sums set opposite to their names, of the third part, the Duke assigned, to the defendants, his furniture, plate, live and dead stock, growing crops, and other effects at Oatlands, upon trust to sell the same, and to pay certain tithes, rates and taxes, and also a debt of 1,138*l.* due to M. P. Romano; and the costs of getting in the crops and carrying on the farm until the 1st of November then next, and the wages of servants and the several debts mentioned in the schedule, not exceeding 50*l.* each, and to divide the residue of the moneys arising from the sale, amongst the several creditors of the Duke, parties to the deed, in proportion to the amount of their debts.

The plaintiff was one of the creditors mentioned in the schedule. The defendants sold the property assigned to them, and received the proceeds. The plaintiff, not having been paid his debt, filed a bill (on behalf of himself and the other unsatisfied creditors of the Duke, who were entitled to the benefit of the assignment,) against the defendants,

(*a*) This case was decided on the authority of Walwyn *v.* Coutts, 3 Mer. 707; and, as the correctness of that report has been frequently questioned, it was thought advisable to give an early report of the former case, and a full statement of the latter. See *post*. p. 7.

charging that he and the other creditors did, in consideration of the deed having been executed in their favor, and on the faith of the provisions thereby made for their debts, forbear to sue the Duke, and that, thereby, the deed was founded on a good and valuable consideration, and was binding on the Duke and the defendants: That on the 24th, and also on the 28th of June 1832, the plaintiff's solicitor called upon Mr Humphries, the solicitor of the defendants and of the Duke in the matters of the proposed deed, when the deed, which had been executed by the Duke, was shown to the plaintiff's solicitor; and that the plaintiff afterwards received a letter from Mr Humphries, which was as follows: "I am directed, by the Earl of Lauderdale, and Colonel Stephenson, to inform you that his Royal Highness the Duke of York has assigned to them all his goods, growing crops, and other personal effects at Oatlands, for payment of certain scheduled creditors, amounting to 8,802*l.* 5*s.* 7*d.* after payment of expenses, and a prior charge which may amount to about 2,000*l.* more or less. Your name is in the schedule to a debt amounting to 191*l.* 3*s.*, and the deeds direct that those debts in the schedule which do not amount to 50*l.* each shall, in the first place, be paid in full, and the dividend between the remaining debts, without preference or priority. It is impossible to say what you may receive under this assignment, as it greatly depends upon the price of the agricultural produce; but if you are not paid in full, what you receive is only to be taken in part." The bill prayed that the necessary accounts might be taken, and that the trusts of the deed might be carried into execution.

The defendant Stephenson, by his answer, said that neither the plaintiff, nor any of the other creditors, executed the deed; that it was executed by the Duke, without their knowledge, privity of concurrence, and was altogether voluntary and without consideration, on his part: that the trustees had, out of the trust-property, paid the tithes, taxes and rates mentioned in the schedule, the debt due to Romano, and also the debts which did not exceed 50*l.*, and that they had, by the express direction of the Duke, paid five sums, amounting to 1,653*l.*, to or for the use of the Duke, and that, though he did not repay them those sums, he had, out of his own moneys, paid several of the creditors the whole or part of their debts, amounting, altogether, to 1,653*l.* and, therefore, that, if the deed was irrevocable, (which the defendant submitted it was not,) the Duke's personal representatives were entitled to stand in the place of those creditors, to the extent of that sum; that the Duke, by calling for or directing payment of the five sums before mentioned, had revoked the deed to the extent of those sums; and that the defendants had been advised that it was doubtful whether they ought not to hold the balance in their hands, in trust for the Duke's personal representatives, and that they had, for that reason, abstained from making any distribution of it amongst the creditors: that the plaintiff, previously to the execution of the deed, did make some very urgent applications, to the Duke, through the defendant, Stephenson (who was then acting as the Duke's agent,) for the payment of his debt, and that the plaintiff's solicitor wrote a letter to the defendant, peremptorily demanding payment, and threatening proceedings at law in case of refusal. The defendant denied that Mr Humphries ever was his solicitor, and said that he was unable to set forth whether Mr Humphries wrote and sent a letter, to the plaintiff, to the purport or effect

stated in the bill; but that, upon the execution of the indenture, he and his co-trustee authorized Humphries to write and send, to the creditors whose debts were mentioned in the schedule, circular letters informing them of the execution of the indenture. The defendant denied that the indenture was an inducement and consideration, to the plaintiff and the other creditors, to forbear to sue the Duke, and said that though the plaintiff and some of the creditors did not, yet others of them did sue the Duke, for their debts.

A motion was now made, for the plaintiff, that the defendants might be ordered to pay, into court, the balance admitted to be in their hands.

Mr Rogers, for the plaintiff, in support of the motion:—

The creditors were made parties to the deed of June 1822; and, although that deed was voluntary, it is binding, under all the circumstances of the case, upon the representatives of the grantor. We are here contesting with the trustees, after the death of the grantor; and they say that, though they have the funds in their hands, they are not to execute the trusts, because they paid over, to the Duke, certain parts of the proceeds of the property assigned to them. But, as the trustees possessed the property, and as the Duke is dead, the deed is irrevocable. If a trust is once created, it is not competent to the party, to defeat it. Ellison *v.* Ellison, 6 Ves. 656, see 662. Although the plaintiff did not actually execute the deed, yet he was named as a party to it, and was privy to its execution and contents: for, on the execution of the deed, Mr Humphries, by the direction of the trustees, wrote circular letters, to the creditors, informing them of the execution and purport of the deed. It was decided in Leech *v.* Leech, 1 Ch. Ca. 249, that a conveyance for payment of debts, generally, to which no creditor was a party, and in which no particular debts were specified, was voluntary: but here the debts were specified, and it can not be disputed that the payment of debts is a sufficient consideration for a deed. But, taking this deed to have been voluntary, the trustees got the property into their hands, and, after that, the grantor could not invoke it. It is a different case where a remittance is merely *in transitu;* for then there is no doubt that it may be recalled.

Mr Pepys and Mr Wigram, for the defendants:

We do not deny the general proposition, that a court of equity will execute a voluntary trust, where the relation of trustee and *cestui que* trust is once duly constituted. But we deny that the deed of 22d June 1822, upon which the plaintiff in this case relies, had the effect of constituting the Earl of Lauderdale and Colonel Stephenson trustees for the plaintiff. The cases of Walwyn *v.* Coutts, 3 Mer. 707, and Page *v.* Broom, 4 Russ. 6, clearly establish that a conveyance upon trust to pay debts, or even to pay a particular debt, which was the case in Page *v.* Broom, does not, where the creditors are not parties or privy to the deed, withdraw the property from the absolute control of the author of the deed, or give the creditors, or particular creditor, a lien upon the property conveyed. Such deeds have always been considered, as in truth they are, merely private arrangements, made by the author of them for his own convenience, and the grantees are trustees for him, and not for the creditors.

The proposition that the author of the deed may recall the property,

is decisive against the right of a party, who rests his case upon the deed alone, to file such a bill as this. A plaintiff must have the right to the decree which he asks at the time he puts his bill upon the file. Barfield *v.* Kelly, 4 Russ. 355. Whereas, in this case, it is clear that the filing of the bill can not restrain the right, of the author of the deed, to recall the property conveyed by it; and, whilst that right exists, the grantees must continue trustees for him and not for the plaintiff.

The only cases in which the property conveyed by such a deed as that of 22d June 1822, has been held bound in favour of creditors, are those in which the trustees have, by dealing with a creditor in pursuance of the deed, constituted themselves trustees for him. An attempt is made to establish such a case here, but without success. The trustees admit that Mr Humphries, with their authority, sent a circular to the creditors of the Duke of York, informing them of the execution of the deed. It does not appear whether the plaintiff received the circular or not. None, however, of the creditors in any manner noticed the circular, in the lifetime of His Royal Highness. Many brought actions against him. After his death a suit, Greenwood *v.* Taylor, was instituted for the administration of his general personal estate, and the plaintiff in this suit went in under the decree in that suit, and proved his present claim, as a debt against the Duke's general personal estate.* At the 11th hour, the plaintiff institutes this suit, having never, till that hour, in any manner noticed the deed in question, and having (for anything that appears to the contrary,) then, for the first time, got intelligence of the deed, or thought of seeking any benefit under it. In the mean time, the defendants, during the lifetime of the Duke of York, handed over to him, by his express desire, or applied according to his directions, the greater part of the proceeds of the property comprised in the deed. They, therefore, hold what remains, as trustees for the general personal estate of the deceased.

The Vice-Chancellor. The question in this case, is similar to that which arose in the case of Walwyn *v.* Coutts; and I have obtained the bill that was filed in that cause ; and I have, also, procured, from the Register's book, a copy of the order made in that case.

The first deed in that cause, was dated the 22d of February 1812; and it is obvious, from its contents, that the object of the Duke of Marlborough, in executing it, was to make a provision for the Marquis of Blandford; and there is no reference in it to any thing which was to move, from the Marquis, to his creditors. It was a deed made by the father to the son, for the purpose of redeeming annuities granted by the son, and paying off the arrears of those annuities; and then, if the trustees thought proper, they were empowered, to raise a sum for the payment of the son's specialty and simple contract debts. It is observable, however, that, by the ultimate trust in that deed, the Marquis of Blandford took a direct interest in the estates, for he was made tenant in fee, of them, in remainder, after the death of the Duke.

The Marquis having thus become tenant in fee in remainder of these estates, became party to another indenture, of the 13th of August 1812, which was made between the Duke of Marlborough of the first part, the Marquis of Blandford of the second part, and Blackstone &

* This fact did not appear upon the answer.

Coutts of the third part. That deed recited that 15,000*l.* had been raised by the parties, that the trustees had not been able to liquidate the demands, and that the Duke and the Marquis had agreed that the trusts of the former deed should be extended so as to enable the trustees to raise, by way of annuity, the sums by the release authorised to be raised by sale or mortgage.

Now in that deed, there was a direct dealing, by the Marquis of Blandford, by means of his reversion in fee, and by that deed he took upon himself to vary the order of payment prescribed by the former deed. Then the character of the parties changed; for we have no longer the father making a provision for the son, but here is a son, who had attained a vested remainder, varying the order in which the trusts had been declared for the benefit of his annuity creditors, and afterwards, for his general creditors.

Then there was a third deed of the 20th of October 1813, made between the Duke of Marlborough of the first part, the Marquis of Blandford of the second part, and Blackstone & Coutts of the third part. And, in that deed, they take notice that the Duke and the Marquis had agreed that the trustees should stand seised of the Hereditaments, &c.— [His Honour here read part of the deed.]

That, certainly, is not a very plain manner of stating what the parties were to do, but those are the terms of the deed. The deed then proceeds thus: "That is to say, upon trust to raise," &c., and the ultimate trust was then declared, as before.

Now, here again, there was a direct interference both by the Duke of Marlborough, and by the Marquis of Blandford, with respect to the disposition which had been previously pointed out for the payment of the annuity creditors, and also, of the other creditors of the Marquis.

Then the bill alleged that the trustees had raised several sums of money, divers parts of which had been paid over by them to the Duke and Marquis: That the plaintiff's annuity and several of the other annuities were still unpaid: That the trustees pretended that they were allowed to apply, the moneys raised, as they should deem most beneficial to the several trusts; but the plaintiff charged that they were bound, by the indenture of the 22d of February 1812, to repurchase the annuities, and pay off the arrears; and that the annuities and arrears were a lien upon the estates, and that the trustees could not apply the moneys to any other purpose, before they should have repurchased the annuities and paid off the arrears: That the Duke and Marquis pretended that they were entitled to have the 3,000*l.* raised and paid to the Marquis, and that the trusts of the indentures were solely for the benefit and accommodation of the Marquis; and that the Duke and Marquis had called upon the trustees to reconvey the trust premises to them.

The bill then prayed that the plaintiff's annuity, and the other annuities mentioned in the schedule to the deed of February 1812, might be declared to be a lien on the estates, and on the moneys raised and to be raised; that the trusts of the indentures might be performed; that the defendants might account for what they had received; and for an injunction to restrain the trustees from reconveying the estates to the Duke or to the Marquis, and from paying over, to them or either of them, any of the moneys raised under the trusts.

To that bill the Duke of Marlborough and the Marquis of Blandford

were made defendants, as well as Blackstone & Coutts. Coutts, in his answer, admitted the deeds, and submitted all the questions of law to the court. Then, on the 11th of May, the plaintiff applied to the Lord Chancellor, for an injunction: and that application was made in terms which raised the question that has been raised by the passages, in the bill, which I have referred to.

That application was opposed by counsel on behalf of the Marquis and the trustees; and the result of it was, that the court did not think fit to make any order upon it, but directed the plaintiff to pay, to the defendants, the costs of the application. So that a more decisive opinion upon it could not have been given by that learned judge.

Now the question is, what is fairly to be inferred from that order: and, having had an opportunity of considering this since the motion was mentioned to me, it appears to me that the principle on which Lord Eldon acted when he pronounced that order, must be taken to be consistent with that which he has repeatedly declared to be the established law of this court, namely, that, where there is an actual settlement made for vesting an estate in trustees, or for vesting stock in trustees for volunteers, there, the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as *cestui que* trusts against the trustees under the deed. I apprehend that the principle of the two decisions in Ellison *v.* Ellison, and Pulvertoft *v.* Pulvertoft, 18 Ves. 84, and of this in Walwyn *v.* Coutts are reconcilable with each other; because I apprehend that Lord Eldon must have considered that, where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of showing how the trust property under the voluntary deed, shall be applied for the benefit of the volunteers. Now it is manifest that my Lord Eldon must have proceeded on this principle: for he must have considered that the first deed was a voluntary deed for the benefit of the Marquis of Blandford; and he must also have considered that, as under that deed the Marquis had become tenant in fee in remainder of the estates, he was, when he executed the two subsequent deeds, dealing with his own property, for his own personal benefit and accommodation, in paying his creditors as he thought proper. Now it appears to me that that is a broad, intelligible ground of decision, the principle of which reconciles the decision in Walwyn *v.* Coutts, with the decisions in Pulvertoft *v.* Pulvertoft, and Ellison *v.* Ellison.

It was said, however, by the plaintiff's counsel, that, in this particular case, the creditors must be entitled to the benefit given by the deeds, on account of the letter that was written by Mr Humphries. Now, in the first place, it is not admitted, by the answer, that that letter was received; and, even if it had been received it does not appear that the creditors ever submitted to take the benefit of the deed, or conformed to its terms, or abstained from suing the Duke. But it has been stated that, so far from this creditor thinking that he was bound to take the benefit of the deed, he actually came in, under the decree made in the suit that was instituted for the administration of the Duke of York's

estate, and proved his debt before the master after the receipt of the letter.

My opinion therefore is that, according to the principle of the decision in Walwyn *v.* Coutts, the creditors would not have had any right to enforce the deed, even if it had appeared that the letter before alluded to, had been received by them, in as much as they did not, by signing and sealing that deed, make themselves parties to it. But supposing that the plaintiff had a right to enforce the deed from receiving that letter, my opinion is that what has passed would have destroyed his right. On the whole therefore, I think that this motion ought to be refused; and, as the case of Walwyn *v.* Coutts is, in my opinion, rightly reported, that it ought to be refused with costs (*a*).

## Walwyn *v.* Coutts.

3 *Simons*, 14.

A father conveys his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee. The annuities were mentioned in a schedule, but the annuitants were not parties to the deed. The father and son then executed other deeds, varying the former trusts: Motion by one of the scheduled creditors, to restrain the trustees from executing the trusts of the subsequent deeds, until they had performed the trusts of the first, refused.

May 11, 1815.

THE bill was filed, by the plaintiff, on behalf of himself and the other creditors of the Marquis of Blandford, who were entitled to the benefit of the after mentioned indentures of the 22d of February 1812, the 13th of August 1812, and the 20th of October 1813. It stated an indenture of the 13th of March 1809, by which the Marquis secured an annuity of 500*l.* to the plaintiff: That, by indentures of lease and release of the 21st and 22d of February 1812, the release being made between the defendant the Duke of Marlborough, of the first part, the defendant the Marquis of Blandford, of the second part, and the defendants Blackstone & Coutts, of the third part, after reciting that the Duke was seised in fee of the manors and other hereditaments thereinafter described, and that the Marquis had granted the annuities mentioned in the schedule thereto, and that the Duke was desirous of relieving him from the payment of them, and also to make such provision for him as after mentioned; the Duke, in consideration of natural love and affection, granted, &c. to Blackstone & Coutts, and their heirs, divers manors, &c. upon trust to raise such sums of money as might be sufficient to re-purchase the annuities mentioned in the schedule, and all such other annuities, if any, as had, previously to

(*a*) See the cases relating to voluntary deeds, in the notes on Gordon *v.* Gordon, 3 Swanst. 400; and also Sugd. Vend. 8th Edit. 649, and the cases there refered to. See also Tarback *v.* Marbury, 2 Vern. 510.

The decision of the case above reported, was affirmed by the lord Chancellor on the 11th of February 1831.

the execution of the release, been granted by the Marquis, and also to pay the arrears of the annuities and the costs incidental to paying off the same and to the execution of the trusts; and then in trust, if Blackstone & Coutts should think proper, to raise any further sum which they might deem expedient, to pay any debts then due from the Marquis that the trustees should consider advisable to be paid: and, for the purpose of raising such sums, it was declared that the trustees should, at such times as to them should seem proper, sell the manors and other hereditaments, and should, in the mean time, mortgage the same or any part thereof, and stand possessed of the money to be raised thereby, upon trust to pay off the annuities and arrears, and then upon trust, if the trustees should think proper, but not otherwise, and at the request of the Marquis, to pay such of his debts as they should consider adviseable to be paid, and then to pay, to the Duke, the surplus of the moneys which should be raised in his lifetime, and the surplus of the moneys which should be raised after his decease, to the Marquis: and, subject to the trusts aforesaid, the trustees were to stand seised, of the manors and other hereditaments, in trust for the Duke for his life, and, after his death, in trust for the Marquis in fee.

The bill further stated that the plaintiff's annuity was mentioned in the schedule, and that, by an indenture dated the 13th of August 1812, and made between the Duke, of the first part, the Marquis of the second part, and Blackstone & Coutts of the third part, after reciting that Blackstone & Coutts, had raised 15,000*l.* by way of mortgage upon a part of the hereditaments, and that they had not been able to raise any further sum by way of mortgage or to sell any of the hereditaments upon advantageous terms, and that it might tend to the prejudice of the Duke and Marquis, if sales were prematurely made, and that most of the annuities granted by the Marquis were still subsisting, and that a considerable part of his debts remained unpaid, and that, in order that the annuities and debts might be repurchased and paid as soon as conveniently might be, the Duke and the Marquis had agreed that the trusts and powers, contained in the release, should be extended, by enabling Blackstone & Coutts to levy and raise, by way of annuity, the sums of money by the release authorized to be raised by sale or mortgage, and also to raise such additional sums of money as thereinafter mentioned, by way of mortgage, sale and annuity, it was declared that Blackstone & Coutts should, subject to the mortgage made by them, stand seised of the hereditaments, upon the trusts of the release preceding the ultimate trusts for the benefit of the Duke and Marquis, and, subject thereto, upon trust to raise, from time to time, money sufficient to pay the interest of any debts, at the date of the release, owing by the Marquis, and the payment of which Blackstone & Coutts should think proper either to make or not to make, or to postpone, and also to raise, if they should think proper, all such sums of money as might be sufficient, from time to time, to pay the annual premiums of any policies of assurance, which might have been or should be effected upon the life of the Marquis, by himself or any of his creditors, for securing any debts which, at the date of the release, were due and owing to them by the Marquis. And it was declared that the trusts and powers contained in the release, should extend to the levying and raising the sums of money by the now stating indenture authorized to

be raised, and that, for the purpose of raising those sums and the sums by the release directed to be raised, it should be lawful for the trustees, if they should think proper, to grant annuities for lives, to be issuing out of the said manors and other hereditaments, in consideration of such sums of money as they should think proper; and the trustees were directed to stand possessed of the money to arise by the sale of such annuities, and which should otherwise come to their hands, by virtue of the trusts thereinbefore declared, upon such trusts preceding the trust for the payments of the ultimate surplus-moneys to the Duke and the Marquis, as, by the indenture of release, were expressed concerning the moneys thereby directed to be raised, and, subject to the same trusts, upon trust, out of the moneys to be raised under the trusts aforesaid, to pay the expenses of preparing and executing the present indenture, and also, if required and thought reasonable, of all such deeds as should be requisite for securing any annuities to be granted as aforesaid, and also, the costs of the performance of the trusts of the present deed, and with and out of the same moneys, to pay the interest of any debts, at the date of the release, due by the Marquis, and the payment of which the trustees should think proper either to make or not to make or to postpone, and also all such annual premiums of any policies of assurance which might have been or should be effected, upon the life of the Marquis, by himself or by any of his creditors, for securing any debts, which, at the date of the release, were due to them by the Marquis, and which debts the trustees might think proper either not to pay, or to postpone the payment of: and subject to the several payments aforesaid, upon trust, to pay the ultimate surplus of the moneys which should be raised, under the trusts of the release and of the now stating indenture, in the lifetime of the Duke, unto him, and the surplus of the moneys which should be so raised after his decease, to the Marquis, his executors, administrators and assigns, for his and their own use and benefit, and to stand seised of the manors and other hereditaments, subject to any annuities to be granted as aforesaid, or so much thereof as should remain unsold or undisposed of, after answering the purposes of the release, and of the now stating indenture, in trust for the Duke and his assigns, during his life, and, after his decease, in trust for the Marquis, his heirs and assigns; provided that it should be lawful for the trustees to perform, either partially or wholly, the trusts of the release and of the now stating indenture, for paying all or any of the debts due by the Marquis at the date of the release, and the interest upon the same debts, nothwithstanding the annuities mentioned in the schedule to the release should not be then repurchased.

The bill further stated that, by an indenture bearing date the 20th of October 1813, and made between the Duke of the first part, the Marquis of the second part and Blackstone & Coutts of the third part, reciting that the Duke, at the request of the Marquis, had agreed to concur with him in extending the trusts and powers contained in the preceding indentures, for the benefit of the Marquis, and of explaining the nature and extent of such trusts, the Duke and the Marquis granted and agreed that Blackstone & Coutts should thenceforth, stand seised of the manors and other hereditaments, upon such trusts, by way of addition to or jointly with, but not so as to extinguish or lessen the trusts declared by the former indentures, (except as they were altered

or explained by the now stating indenture) as were thereinafter expressed; that is to say, in trust, if the trustees should think proper, to raise such sums of money which should be requisite to keep down the interest, as well of two mortgages for 15,000*l.* and 18,000*l.* therein mentioned to have been already made, as of any other mortgage which should thereafter be made of the said manors and other hereditaments under the trusts of the said indentures and the now stating indenture, and also the arrears of any annuities charged or to be charged upon the manors and other hereditaments pursuant to the trusts of the same three indentures, and to apply, the moneys to be raised, in payment thereof accordingly. And also in trust, at such times as the trustees should think proper, to raise 30,000*l.* and to pay the same to the Marquis, for his use and benefit, at such time or times as the trustees should think proper, and to raise any further sums of money which the trustees should think fit to raise, and to apply the same either for the payment of any debts of the Marquis since the date of the release of the 22d of February 1812, or after the now stating indenture to be contracted, or otherwise for the benefit or under the direction of the Marquis: provided that it should be lawful for the trustees to pay and apply all the sums of money which should be raised by them under the three indentures, upon any of the trusts by those indentures declared concerning the moneys to be raised by virtue of the trusts thereof, in preference to any of the other trusts thereby declared, and that no person for whose benefit any sums of money was, by the three indentures, authorized to be raised, should in respect of such sum, have any equitable charge or lien upon the manors and other hereditaments: and, by this deed, the same trusts were declared of the surplus of the moneys to be raised, and of the hereditaments which should remain unsold, as were declared respecting them by the two former deeds.

The bill then stated that Coutts & Blackstone, had raised divers large sums of money upon the security of the estates, divers parts of which they had paid over to the Duke and Marquis, or one of them, with the consent of the other of them, and that the trusts of the said several indentures still remained, in a great degree, unperformed, and that the plaintiff's annuity of 500*l.* together with many of the other annuities specified in the schedule to the release, had not been repurchased, and that large arrears had been suffered to accrue due upon all the subsisting annuities, contrary to the said trusts reposed in Coutts & Blackstone.

The bill charged that Coutts & Blackstone were compellable, by virtue of the said several indentures, and especially of the indenture of the 22d of February 1812, to repurchase the scheduled annuities, and to pay off the arrears thereon, and that the said annuities and arrears thereby became a lien or charge upon the trust-property, and that the trustees could not apply the moneys which they had raised or should raise by virtue of the indentures, to any other purpose, before they should, in the first place, have repurchased the said annuities and paid off the arrears, without an actual violation of the trusts, and without a personal responsibility attaching upon them for so doing: and that the Duke and the Marquis pretended that they were entitled to call upon Coutts & Blackstone to raise the 30,000*l.* and pay the same to the Marquis, pursuant to the trusts of the indenture of the 20th of Octo-

ber 1813, and that the trusts of the three indentures were solely for the benefit and accommodation of the Marquis, and that the several annuities which were specified in the schedule to the release, were not a lien or charge upon the trust-property, and that the trustees had a discretion reposed in them, by virtue of the indentures, to perform any of the subsequent trusts, contained in the several indentures, in precedence to the trusts thereby declared for the benefit of the plaintiff and the other annuitants, provided the trustees should think fit so to do. The bill then alleged that the Duke and Marquis had called upon the trustees to reconvey, to them, the trust-premises, or to pay over to them the moneys which they should raise by sale or mortgage thereof, and that the trustees intended so to do unless restrained, &c.

The bill prayed that the annuity granted to the plaintiff and the arrears thereof, and the rest of the annuities mentioned in the schedule to the release of 1812, might be declared to be a lien or charge upon the manors or other hereditaments, and on the moneys raised and to be raised pursuant to the trusts of that indenture, and also of the indentures of the 13th of August 1812, and the 20th of October 1813, and that the trusts of the said indentures might be carried into execution, and that all the defendants might be decreed to account for the moneys received by them on account of the rents and profits of the trust-premises, or which had been raised, by mortgage thereof or charge thereon, since the 22d of February 1812, and that the balance found due on taking the accounts might be applied upon the trusts of the said indentures, and in the redemption of the plaintiff's annuity and the other annuities which were subject to redemption, and that Coutts & Blackstone might be restrained from reconveying the premises to the Duke and Marquis, or to any other person otherwise than in performance of the trusts reposed in them by the indentures, and from paying over, any money received by them under the trusts of the said indentures, to the Duke and Marquis, or either of them, or to any other person, otherwise than in performance of the trusts of the said several indentures.

The following is the order referred to by the Vice-Chancellor, *ante*, p. 8.

"Whereas Mr Leech, of counsel for the plaintiff, this day moved, and offered reasons unto this court, that an injunction might be issued to restrain the said defendants, James Blackstone and Thomas Coutts from performing, or executing any, or either of the trusts reposed in them by the several respective indentures of the 22d day of February and the 13th day of August 1812, and of the 20th day of October 1813, mentioned in the pleadings of this cause, until they should, in the first place, have levied and raised such sum or sums of money as should be necessary or requisite for the repurchase of the several annuities mentioned in the pleadings of this cause, and for the payment of the arrears thereof, and until they should have paid and applied the same respectively, according to the trusts, by the said several indentures for that purpose made and declared, in the presence of Sir Samuel Romilly, Mr Bell, Mr Shadwell and Mr Hampson, of council for the defendants. Whereupon, and upon hearing what was alleged by the counsel on both sides, this court doth not think fit to make any order

on the said notice of motion, but doth order that the plaintiff do pay unto the defendants the costs of this application to be taxed, &c."

Reg. Lib. B. 1814, fol. 949.

## Browne *v.* Dunn.

3 *Simons*, 23.

An application to amend, under the 13th order, must be supported by a joint affidavit of the plaintiff and solicitor.

March 28, 1829.

## Goblet *v.* Beechey.

3 *Simons*, 24.

A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written: Reference directed to ascertain what was meant, the master taken to his assistance persons skilled in writing, and acquainted with articles used by statuaries (*a*).

April 30, 1829.

JOSEPH NOLLEKENS, an eminent statuary, by his will dated the 21st of March 1818, gave, amongst other legacies, 100*l.* to the plaintiff, who was one of his workmen; and afterwards directed that his collection of *vertu*, in antiques, marbles, busts, models, printed books, prints and drawings, except such books and prints as he had before disposed of, should be sold by auction, and that the plaintiff should be employed to arrange, prepare and clean his said marbles, busts and models, to fit them for sale, and that he should be paid one guinea a-day for his trouble; and the testator gave his property in the funds, the moneys to arise by the sales aforesaid, and all other the residue of his estate and effects, to F. R. Palmer, F. Douce and the Rev. Edward Balme, and appointed the two last gentlemen his executors. The testator made several codicils to his will. By the fifth codicil, which was dated the 29th of January 1819, he revoked the residuary bequest in his will, and gave his property in the funds, the moneys to arise by the aforesaid sales, and the residue of his estates and effects to Palmer, Douce, Balme and the Rev. Thomas Kerrick. By the sixth codicil, which was dated the 15th April 1819, he gave, to the plaintiff, an annuity of 30*l.* for his life, in lieu of the legacy of 100*l.* By the eighth codicil, which was dated the 7th of February 1820, the testator directed that all the marble in his yards, and all the working tools in his study, should be delivered, by his executors, to the plaintiff, in

(*a*) In Easter Term, 1831. The Lord Chancellor, reversed the decree on further directions.

consideration of his care and attention to the testator. The eleventh codicil was as follows: "This 28th day of January 1822—memorandum, that in case of my death, all the marble in the yard, the tools in the shop, bankers, mod (*a*) tools for carving, the rasp in the draw, with (*b*) and the draw in the parlour shall be the property of A. Goblet."

The testator died in April 1823.

The bill charged that the word "mod" in the 11th codicil, meant "models"; and prayed that the defendants, the executors, might be decreed to pay, to the plaintiff, the sum of 738*l.* 1*s.* 3*d.* being the amount for which they had sold the testator's models.

The defendant Douce, in his answer, said that the testator's models were very rare and valuable specimens of art, and insisted that, from the context of the will and 11th codicil, it appeared that the testator, by the word "mod" did not mean his models, but his modelling tools.

It was proved that the plaintiff had been in the testator's employment for thirty years and upwards, and had been held in great estimation by him. Three sculptors, who were examined as witnesses for the plaintiff, deposed that, in their opinions, the testator, by the word "mod," meant models. A female servant of the testator, who was the attesting witness to the eleventh codicil, swore that, before she subscribed her name, she read over the codicil in the presence and hearing of the testator, and that, when she came to the word in question, she asked the testator what he meant by it, and that he replied models.

The cause was heard on the 13th of July 1826, before Sir John Leach, Vice-Chancellor, when his honour held that the evidence of the female servant was clearly inadmissible, and referred it to the master to inquire and state to the court what was intended, by the testator, by the word between the word "bankers" and the word "tools," and the word between the words "draw" and "and" in the codicil dated the 28th of January 1822: and directed that the master should be at liberty to call to his assistance persons skilled in the art of writing*, and also persons who had competent knowledge of the tools and articles used in the business of a statuary.

The master reported that bankers were solid pieces of wood, upon which blocks of marble were placed for the purpose of being carved, and that those and all the other articles mentioned in the 11th codicil, except the models, were of small and trifling value, but that the testator's models were of the value of 700*l*, and upwards: that he had called to his assistance Mr John Caley, a person skilled in the art of writing, and Mr Charles Garrard, a sculptor and statuary: that Mr Caley could form no judgment as to what was intended by the word "mod," but that Mr Garrard understood it to be a contraction of the

(*a*) There was a mark at the end of this word. One of the questions in the cause was, that the testator intended by it. See next page.

(*b*) The word that occurred in this part of the codicil appeared to be "nevre" or "nepre." One of the objects of the suit was to ascertain what the word was, and what was the meaning of it. See next page.

* Of deciphering writing. Qu.

word "models:" and the master being of opinion that Mr Garrard's interpretation was correct, reported accordingly. And the master also found according to the explanation of Mr Garrard, that the word between "draw" and "and" meant the apron.

The defendant Douce excepted to the report, alleging that the master ought to have reported that he had been unable to ascertain, and therefore could not state, to the court, what the testator intended by the word between the words "bankers" and "tools."

The cause now came on to be heard upon the exception and for further directions.

Mr Sugden, Mr Martin, and Mr Jacob, for the exceptant, contended that the testator having disposed, by his will, of his busts and other articles of *vertu*, had, by the eleventh codicil, given to the plaintiff (who was one of his workmen,) his blocks of marble, and the bankers on which they were to be placed for the purpose of being carved, and every thing else that was requisite to enable him to go on with the work.

Mr Horne and Mr Sidebottom in support of the master's report, said that three eminent sculptors had been examined before the hearing of the cause, and that they had all said that the word "mod" meant models.

Mr Pepys and Mr Bridger appeared for other parties.

The Vice-Chancellor said that if, in the judgment of three eminent sculptors, the word "mod" meant models, he should not consider himself to be warranted in putting a different interpretation upon that word. His Honour accordingly overruled the exception, and declared that the plaintiff was entitled to the models which the testator was possessed of at his death or to the money produced by the sale of them; and ordered that the executors should pay the 738*l.* 13*s.* to the plaintiff (*a*).

## Dalby *v.* Pullen.

3 *Simons*, 29.

A purchaser who has contracted for the entirety of an estate, will not be compelled to take six undivided seventh parts of it.

On a sale under a decree, the abstract stated that the vendor was devisee of A., who took as heir to B., and on inquiry, the vendor's solicitor confirmed that statement: the master accordingly approved of the title. Just before the conveyance was executed, the purchaser discovered that C., was the heir of B., and it appeared that the vendor's solicitor had received information of that fact, but concealed it. A motion, by the purchaser, to be discharged from his purchase, was granted, though the vendor had obtained a release from C. before the motion was made.

May 1, 15, 1829.

NICHOLAS CARTER devised all his freehold and copyhold

(*a*) See the observations upon this case, in a work recently published by Mr. Wigram, and intituled, "an examination of the rules of law respecting the admission of extrinsic evidence," &c.

estates, to his wife, for her life, and directed that, after her decease, the same should be sold, and that the moneys produced by the sale should be divided amongst his seven daughters. The testator died in the year 1784, leaving his widow, and seven daughters (who were his coheirs) surviving him. In 1811, the widow died. On the 13th of March 1813, the decree in this cause was made by which the will was established, and the testator's estates were directed to be sold; and, on the 29th of July following, they were sold accordingly. At the sale, Sir Robert Wigram purchased lots 1, 2, 8 and 9. On the 19th of July 1822, the master reported that a good title could be made to all these lots, except lot 2; and, on the 4th of December 1824, Sir Robert Wigram was discharged from his purchase of that lot, and was ordered to pay, into court, his purchase money for the three other lots, and to be let into possession of them from the 29th of September then last, and all necessary parties were ordered to join in conveying them to him.

Owing to the complication of the title, much time was occupied in settling the conveyance; and just as the draft was about to be engrossed for execution, a claim adverse to the title of Nicholas Carter, was set up by a person named John Carter.

In order to show the grounds of this claim, it is necessary to state that the abstract, which was delivered to Sir Robert Wigram in November 1813, represented Nicholas Carter to be the devisee of his eldest brother John Carter, who purchased the estate. Afterwards, however, it appeared that the conveyance to John Carter was dated subsequently to his will: and, consequently Sir Robert Wigram's counsel, who advised on the abstract in November 1814, required that the fact of Nicholas being heir to John, should be proved; and that, for that purpose, certificates should be produced of the marriage of their parents and of their own baptisms. In November 1816, the Vendors' solicitor stated in reply, that he could not find the entries of the marriage of George Carter, who was the father of John and Nicholas, in the Parish register, although he had searched for it; but that he had found the entries of the baptisms of John and Nicholas, by which it appeared that the former was born on the 24th June 1726, and baptised on the 17th of July following; and that the latter was born on the 5th January 1731, and baptised on the 30th June following. The vendors' solicitor added that, on the death of John Carter, in 1781, Nicholas Carter applied to be admitted to three copyhold estates, which, owing to John Carter not having surrendered them to the use of his will, Nicholas could not take as his devisee, and that Nicholas was afterwards admitted as heir of his brother John. This evidence was considered sufficient; and the master reported in favour of the title as before mentioned. However, in November 1826, the adverse claim was made by John Carter, who alleged himself to be the son of George Carter, who was the second brother of John Carter deceased, and consequently older than Nicholas. Upon this, Sir Robert Wigram's solicitor searched the Parish register and found that the representations made by the claimant were correct, inasmuch as it appeared that George Carter, the father of John and Nicholas, had another son named George, who was born on the 21st of August 1727, and baptised on the 3d of September following, and that the claimant was his son.

[Dalby *v.* Pullen.]

On the 15th of January 1827, a motion was made, on behalf of Sir Robert Wigram, that he might be discharged from his purchase of lots 1, 8 and 9. In support of this motion, his solicitor deposed that, in the abstracts, and in the intercourse had by him with respect to the title to the estate, it had been always represented that Nicholas Carter was the brother and heir at law of John Carter, deceased, and that, as part of the evidence of the title to such estate, copies of the certificates of the baptisms of the two brothers, John and Nicholas, were furnished to him: and that the first time that he heard that John Carter, the claimant, had any title, or made any claim to the estates, was on the 29th of November 1826. Thoms Price, who was the brother-in-law of John Carter, the claimant, also made an affidavit, in which he swore that, on or about the 4th of December 1826, he conversed with the plaintiff, Thomas Dalby, touching his brother-in-law's claim to the estates, and that Thomas Dalby, upon that occasion, informed him that, about ten years before, he had expostulated with his solicitor, (who was also the solicitor for the vendors), touching the long delay which had taken place in bringing the affairs of the late Nicholas Carter to a settlement, and that his solicitor told him, that Sir Robert Wigram's attorney wanted an heir at law to John Carter, that he knew there was an heir at law, but that he could not bring him forward without endangering half of the freehold property. The plaintiff's solicitor deposed, in reply, that, at the time of preparing the abstracts, he had never heard any question raised respecting Nicholas Carter being the next brother and heir of John Carter, and firmly believed him to be so; that the manner in which Nicholas Carter was noticed, in the wills both of George Carter his father and John Carter his brother, at the next devisee of their respective estates, confirmed him in his belief, which was further established by Nicholas Carter being admitted in 1781, as heir to his brother John, to certain copyhold estates which John Carter had not surrendered to the use of his will, at which time the different members of the family, and their respective degrees of relationship must have been within the knowledge of all the parties interested, and that it appeared, by the will of John Carter, that his brother George was a legatee therein named: that, although a period of forty-five years had elapsed since the death of John Carter, no legal proceedings whatever had been taken to controvert the title of Nicholas Carter, as heir of his brother John.

Upon the hearing of the motion, it was referred back to the master to inquire and state whether a good title could be made to the premises comprised in lots 1, 8 and 9, or any and what parts thereof, and the parties were to be at liberty to adduce, before the master, such further evidence as they should think fit.

On the 30th of June 1827, the master reported that a good title could not be made to the premises, comprised in lots 1, 8, and 9, or any part thereof. The plaintiffs excepted to this report, alleging that the master ought to have reported that a good title could be made to six-seventh parts of the premises, a fine with proclamations having been levied by six of the coheirs of Nicholas Carter, in the year 1816 (the other coheir being then abroad) the immediate object of which was to give effect to a conveyance which had shortly before been made, by the parties interested in the estate, to two trustees, with a view to facilitate

the sales, and render the conveyances to the purchasers more simple and concise.

Mr Horne, Mr Whitmarsh, Mr Wray and Mr Teed in support of the exception, relied upon John Carter's right being barred by the fine and non-claim; and said that the word "part" in the order of reference, meant any portion of the estate, whether divided or undivided.

Mr Sugden, Mr Bickersteth and Mr Wigram, for the purchaser, said that it was admitted that the title was bad as to one-seventh, and that, therefore, the purchaser could not be compelled to take the other six sevenths. Roffey *v.* Shallcross (*a*).

The Vice-Chancellor said that the reference was not so worded as to give the master an opportunity of reporting whether a good title could be made to the six-sevenths included in the fine, and over-ruled the exception.

Upon the exception being over-ruled, a motion was made, for the purchaser, that he might be discharged from his purchase; and, at the same time, the plaintiffs moved for a reference to the master, to review his report of the 30th of June 1827, "the vendors submitting that they are now able to make a good title."

It appeared by an affidavit made in support of the latter motion, that, on the 23d of February 1829, an order was made, on the application of some of the parties in the cause, for a reference to the master to inquire whether it would be beneficial to the parties to pay to John Carter, the claimant, 1,000*l.* out of the funds in the suit, as a consideration for his executing a release of his claim. The master having reported in the affirmative, the sum was raised and paid to the claimant; and, on the 14th of March 1829, the release was executed by him.

Sir Robert Wigram's present motion (of which notice was given on the 4th of December 1828), was supported by an affidavit made by his solicitor, in which the contents of the former affidavits made by him, and by Thomas Price, the claimant's brother-in-law, were embodied, and in which it was also sworn that the register recording the baptisms of the Carters, was very methodically and regularly kept, and that the entries therein were made in a large and legible hand-writing; and that no person searching therein, in the ordinary mode, for the children of George Carter, the claimant's grandfather, between May 1726 and the year 1734, could, according to the deponent's judgment and belief, fail to observe the entry of the baptism of George Carter, the claimant's father, in the year 1727.

The vendors' solicitor made an affidavit in reply, in which he deposed that, at the time he made out the abstract, Dalby having told him that Nicholas Carter was the surviving brother and heir at law of John Carter, he never entertained any doubt of the fact being so: that he was confirmed in that opinion by the facts stated in his former affidavit, and believed that George Carter, was a younger brother of Nicholas, and that he died in the lifetime of his brother John. He denied that the copies of the registers of the baptisms of John and Nicholas Carter, were sent, to the purchaser's solicitor, and the regis-

(*a*) 4 Madd. 227. See Sugd. Vend. 274, 8th Edit.

ter of George omitted, for any improper purpose, or with a view to any fraud or concealment; for the purchaser's solicitor requiring the registers of the baptisms of John and Nicholas only, and not a general pedigree to be made out, the deponent procured copies of those registers only that were expressly required. He further stated that he never was informed, by any of the parties, or in any other way, that there was any brother of John Carter older than Nicholas, or that such brother, George, had left any issue, until several years after the estates were sold, and the deeds conveying the estates to the trustees in trust to convey to the purchasers, and the fine levied in pursuance thereof, were executed and levied: That he positively denied that he, the deponent, upon the application referred to in Price's affidavit, or at any other time, stated, to the plaintiff Dalby, what he is therein represented to have said to him; but he believed that he did inform Dalby, of a rumour that he had heard that Nicholas Carter had an elder brother George, and that, if any other person could support a claim as heir at law, it might endanger the loss of a considerable part of the estates; and that Dalby then said that he always understood that Nicholas was the heir of John, and requested deponent not to speak of his having heard any thing that might impeach the title of Nicholas to the estates which he took as heir of his brother John.

Mr Sugden, Mr Bickersteth, and Mr Wigram for the purchaser, cited Lechmere *v.* Brasier, 2 J. & W. 287; see p. 289, and said that though the vendors' solicitor had sworn that, when he prepared the abstracts, he had never heard any question raised as to Nicholas Carter being the heir of John, yet he had never said when he first learnt that Nicholas was not the heir of John: That the purchaser was warranted, by the contents of the affidavits, in asserting that the vendors' solicitor knew that George Carter, the grandfather, had another son besides John and Nicholas, and that that other son was older than Nicholas, and consequently was John's heir; and that he wilfully suppressed those facts; or at all events, that he had been guilty of gross negligence in not discovering them, for which his clients must be answerable: That the contract was entered into so long ago as the year 1813: That in 1818, the purchaser had applied to be discharged from his purchase: That he had been exposed to great delay, litigation and expense, and that the court would, in the due exercise of its discretion in cases of this nature, discharge him from his purchase.

Mr Horne, Mr Whitmarsh, Mr Wray and Mr Teed, for the vendors, said that Sir R. Wigram had been, for a long time, in possession of the property, and that his possession could not now be disturbed; that he had sustained no injury: That it was the fault of his solicitor that the register was not searched on his behalf: That, by the release and conformation, an end had been put to all adverse claim: That, in Lechmere *v.* Brasier, the court was called upon to administer the estate of a testator, for the benefit of his creditors, and had fallen into an error in directing the sale, which was not the case here. They cited Coffin *v.* Cooper, 14 Ves. 205, Wynn *v.* Morgan, 7 Ves. 202, and Esdaile *v.* Stephenson (*a*).

(*a*) Madd. & Geld. 366. See Sugd. Vend. 8th Edit. 208, & 373, *et seq.*

[Dalby *v.* Pullen.]

The Vice-Chancellor. The question to be disposed of upon these motions, is whether the conduct of the parties has been such as to authorize the court to discharge Sir Robert Wigram, from his purchase.

Sir Robert Wigram, in 1813, became the purchaser of lots 1, 2, 8 and 9. The title to lot 2, was derived under the will of John Carter. The title to lots 1, 8 and 9, was not derived under the will, but under a conveyance, to John Carter, made subsequently to the date of his will. I mention this, in order to remove the objection that has been stated in the argument, that George Carter is named in the will of his brother John. It appears that there was a great deal of discussion as to the title to lots 1, 8 and 9. In November 1814, a requisition was made, by the counsel who had to advise upon the title for Sir Robert Wigram, that it should be ascertained that Nicholas Carter was the heir of John Carter, as the latter's will was dated before the conveyance to him of the 8th of November 1778. In answer, a statement was sent, in 1816, that John Carter was the elder brother of Nicholas Carter; that he never was married, and, therefore, died without issue, and the estates which did not pass, by his will, to Nicholas, were taken by him as heir at law, and that they have remained in the possession of him and his devisees for above thirty-five years.

The next circumstance to be considered, is the species of information, that the vendors' solicitor had, that Nicholas Carter was not the heir of his brother John, and when that information was acquired. Thomas Price, makes an affidavit, in January 1827, that he had conversed, with the plaintiff Dalby, about his brother-in-law's claim to the estates, and that the plaintiff upon that occasion informed him, &c. With reference to that affidavit, the vendors' solicitor says he denies that he made the statement to Dalby, which Price's affidavit represents him to have made; but he believes that he did inform Dalby of a rumour that he had heard that Nicholas Carter had an elder brother named George.

That, therefore, being an admission of information acquired by the vendors' solicitor, what does he do in pursuance of the requisition made by the counsel for Sir Robert Wigram. He returns an answer stating merely that he could not find any entry, in the register, of the marriage of the father and mother of John and Nicholas Carter, and he sends the certificates of their baptisms, and copies of admissions of Nicholas, as heir to John, to certain copyhold estates that did not pass by the will of John. I cannot think that this was fair dealing on the part of a solicitor who had reason to suspect that Nicholas Carter was not the heir of his brother John: for no one, as it appears to me, can think that the meagre answer given to the requisition, was a fair statement of the facts of the case. After the rumour, the vendors' solicitor was bound to search the register further, so as to ascertain whether there was another brother who was older than the reputed heir. A very moderate search would have led him to the discovery that John Carter had another brother who was older than Nicholas. But he looks at part only of the register, which shows that John was born in June 1726, and Nicholas in January 1731, and allows the matter to proceed as unworthy of further consideration, and thus lulls Sir R. Wigram and his solicitor into the belief that there was no other brother of John

Carter. I think, therefore, that, in this case, there has been a course of dealing as to heirship, which this court ought not to countenance, and that the parties have precluded themselves from the benefit of the rule which prevails in this court, as to the time allowed to vendors to remove objections to title. The consequence is that Sir Robert Wigram's motion must be granted, and the cross motion refused with costs.

An application having been made, to the Lord Chancellor, that the above order might be rescinded, and for a reference back to the master as prayed by the cross motion; his Lordship, on the 30th March 1830, refused the application, with costs.

## Foster *v.* Banbury.

3 *Simons*, 40.

A legacy to a witness to a will relating to personal estate only is not void, under 25 G. 2, c. 6.

May 8, 1829.

THIS suit was instituted for the purpose of having the trusts of the will and codicil of John Worth, deceased, which related to personal estate only, carried into execution under the decree of the court.

The testator by his will, which was dated the 17th March 1799, disposed of the residue of his personal estate, amongst the defendant, Huntley Bacon, and four other persons, in equal fifth parts. By a codicil, dated the 25th of February 1808, he directed that the defendants, Mary Bacon, widow, and Ann Deane, should participate in the residue, equally with the legatees named in his will. The testator died on the 26th February in the same year.

Mary Bacon was one of the attesting witnesses to this codicil, and the bill charged that, on that account, the bequest to her was void.

Mr Wakefield and Mr Bickersteth, for the plaintiffs, argued that, though the preamble of the 25th Geo. 2, c. 6, alluded to wills of real estates only, the enacting parts of it were in general terms, and extended to any will or codicil, and to personal as well as to real estate: That the preamble of an act might have relation to part only of the act, and that the rest was not to be made void because the preamble did not relate to it; and, consequently, that the principle adopted by the ecclesiastical court, in Brett *v.* Brett (*a*), and Emanuel *v.* Constable, (*b*), was not to be followed: and that as the words of the act, were clear, they were not to be controlled by the preamble. Lees *v.* Summersgill, 17 Ves. 508, Emanuel *v.* Constable.

(*a*) 3 Addam's Eccles. Rep. 210. On the 21st of May 1827, this decision was affirmed by the high court of delegates. See 1 Haggard Eccles. Rep. 58, n. (*a*).

(*b*) Rolls, 26 June 1827, cited 1 Haggard, 59; this case is now reported, see 3 Russ. 436.

Mr Sugden, for the defendant Mary Bacon, declined to argue the question.

Mr Spence, Mr Wilson, Mr Loraine, and Mr R. Roupell, appeared for the other parties.

The Vice-Chancellor declared that the bequest, in the codicil, to Mary Bacon, was not made void by the statute: that the residue was divisible into seventh parts, and that she was entitled to one of those parts. His honor added that, when the question was first submitted to him, he thought that it had been decided the other way, but that he was bound by the decision in Brett *v.* Brett (*a*).

## Chambers *v.* Waters.

3 *Simons*, 42.

A. having contracted for the purchase of an estate, agrees by deed, to convey it to two partners to whom he was indebted, upon trust to sell, and after paying prior charges, to retain their own debt; and it was provided that the power of sale might be exercised, by the partners, before any conveyance should be made to them. No conveyance was ever made or required to be made to the partners, nor did they attempt to exercise the power of sale, and one of them having died, the survivor agrees with an agent of A. to purchase the estate: Held that he was not a trustee; but stood in the situation of a creditor, with a security for his debt, and therefore was not disqualified from purchasing the estate.

May 8, 9, 12, 14, 16, 19, 21, 1829.

THE bill in this cause was filed in order to enforce the specific performance of an agreement for the sale of the Opera-House, made between John Mills, Esq. on behalf of the defendant, Waters, (who was then resident abroad) and the plaintiff.

Mr Sugden, Mr Collinson, Mr Bickersteth and Mr G. Richards, appeared for the plaintiff.

Sir C. Wetherell, Mr Horne, and Mr Pepys, for the defendant, Waters.

Mr Treslove, Mr Rose and Mr Wheatley, for the other defendants, the executors of Taylor.

The pleadings and evidence in the cause, were of great length. One of the questions that arose was, whether Chambers was not a trustee for the sale of the Opera-House, at the time when he entered into the contract, and thereby disqualified to become the purchaser of it.

The transactions upon which this question arose, are fully stated in the Judgment.

(*a*) As to the effect to be given to the preamble in construing a statute, see Copeman *v.* Gallant, 1 P. W. 314; Rex *v.* Bigg, 3 P. W. 434; Ryall *v.* Rolle, 1 Atk, 165; the King *v.* Pierce, 3 M. & S. 62.

[Chambers *v.* Waters.]

The Vice-Chancellor. In this case a bill was filed, originally, by Mr Chambers, and, on his becoming bankrupt, a supplemental bill was filed by his assignees, against Waters and Taylor, for the specific performance of an agreement made in the month of August 1821, for the sale, by Waters to Chambers, of the Opera-House. It appears that there had been a cause intituled Waters *v.* Taylor, in which a decree was made for the sale of the Opera-House; and under that decree, Mr. Waters had become the purchaser, of that property, at the sale; but, in consequence of his not having given an adequate price, the sale was set aside, and a re-sale was directed. At the second sale, Mr. Waters again became the purchaser of the Opera-House, for the price of 70,150*l.* As Waters was not in a situation to pay the deposite, which was ten per cent. upon the purchase-money, Messrs. Birch & Chambers, who were then in partnership as bankers, advanced to him the sum of 6,000*l.* to enable him to make good the deposite. Waters was an incumbrancer upon the theatre at the time of the sale, and was allowed to retain the amount of his demand out of the purchase-money; so that after paying the deposite, and retaining the debt owing to him, there remained due from him a balance amounting to 28,973*l.* By a subsequent order in the cause of Waters *v.* Taylor, Mr Waters was directed to pay this balance into court; and, as he was also unable to make that payment, Birch & Chambers advanced to him the further sum of 28,000*l.*, and he then paid the balance of his purchase-money into court. It appears that, in addition to the sums which, as I have before stated, Birch & Chambers had advanced to Waters, they had lent him a third sum amounting to 3,000*l.* To secure the 6,000*l.*, Mr Waters had his surety, Mr Mayhew, joined in a promissory note for that sum, to Birch & Chambers; and by a deed of the 16th of September 1816, Waters covenanted with Mayhew, that he would pay the note and indemnify Mayhew in respect of it, and also that he would execute an assignment to Mayhew of all his interest in the theatre, and of all the benefit and advantage that he then had therein, or in the proceeds thereof, or to which he might be entitled under any decree made or to be made in the suit of Waters *v.* Taylor, upon trust to raise such sums as should be required to answer the 6,000*l.* and interest, and to indemnify Mayhew in respect of his having become surety for Waters. Then a deed-poll of the 4th of October 1816, was executed, by which Waters gave, to Mayhew, an additional security upon his interest in the Opera-House, as a further indemnity against the debt of 6,000*l.* Then by an indenture dated the 5th of October, 1816, and made between Waters of the first part, Birch & Chambers of the second part, and Mr Mayhew of the third part, in consideration of the 3,000*l.* lent by Birch & Chambers to Waters, Waters covenanted that the indenture of the 16th September 1816, and all the covenants therein contained (subject nevertheless to the securities thereby given to Mayhew), should operate as a security, to Birch & Chambers, for all the sums of money which they had paid, or might pay to Waters, together with lawful interest for the same. Then there comes that instrument upon which so much discussion has arisen, namely, the deed of the 25th of August 1817. As to that, it becomes necessary to determine whether there is any ground for the objection taken to this contract; as it was said that Chambers was himself a trustee, and

therefore could not, properly, purchase. Now the deed of the 25th of August 1817, is between Waters of the first part, Mayhew of the second part, and Birch & Chambers of the third part. It recites the deed-poll of the 4th of October 1816, and the indenture of the 5th of October 1816; and then it takes notice that, prior to the date of the instrument in question, there was due from Waters to Birch & Chambers the sum of 9,000*l.*, and that Waters had granted an annuity of 1,200*l.* to the Eagle Insurance Company, and which was charged upon certain freehold and leasehold estates, not including the Opera-House, and which was redeemable upon the payment of 12,000*l.*; and that Waters being unable to comply with the order for the payment of the 28,973*l.*, Messrs. Birch & Chambers paid that amount for him. And then the indenture witnesses that in consideration of the premises, and, particularly in consideration of the 9,000*l.*, previously due and owing to Birch & Chambers, and of the further sum of 28,000*l.* that day advanced and paid by them to Waters, Waters did, for himself, his heirs, executors and administrators, covenant with Birch & Chambers, their executors, administrators and assigns, that he would, with all convenient speed, assign all the leasehold buildings and premises which were charged with the annuity granted to the Eagle Insurance Company, unto Birch & Chambers, their executors, administrators and assigns, or to one or more trustee or trustees, nominated by them, upon trust, with all convenient speed, to sell and absolutely dispose of the same by public auction or private contract. Then the deed directs that the money to arise from the sale shall be applied in the redemption of the annuity, and in satisfaction of the 28,000*l.* and the 9,000*l.*, or such other sum as should, for the time being, remain due from Waters to Birch & Chambers, on the security of the Opera-House; and then Waters further covenanted with Birch & Chambers, and Mayhew consented and agreed, that Waters should, at any time thereafter, at his own costs and charges, and upon the request of Birch & Chambers, assign and convey unto Birch & Chambers the King's Theatre or Opera-House, with all its appurtenances, and all sums of money, stock, funds and securities which, by virtue of any decree or order of the court in the suit of Waters *v.* Taylor, or in any other suit touching the theatre, might become payable or transferable, to Waters, in respect of his right and interest, as a proprietor, creditor, or otherwise in respect thereof, and all the right, title, share and interest of Waters in, to, or out of the Opera-House as a proprietor or creditor thereof, or as the purchaser at the sale, or otherwise howsoever, to hold the same, unto Birch & Chambers, by way of security for the repayment to them of the principal sums of 9,000*l.* and 28,000*l.* And then the deed states that, in the assignment to be made of the theatre with its properties and appurtenances, shall be inserted a full and absolute trust or power to sell the same premises, or Water's right and interest therein, at such time, and in such manner as Birch & Chambers should think expedient, and to apply a competent part of the proceeds in satisfying the incumbrances affecting the same, according to their priorities, together with the most ample provisions, by way of indemnity to purchasers, but subject to a stipulation, as between the parties thereto, that no sale should take place without three calendar months previous notice in writing to Waters; and then it was agreed that Birch &

[Chambers *v.* Waters.]

Chambers should stand possessed of the clear moneys to be raised, recovered or received by them in pursuance of the powers or authorities vested or to be vested in them as aforesaid, after satisfying all expenses incident thereto, and all costs then or thereafter payable to Mr Mayhew, agreeably to the terms and conditions of the recited indentures, and all prior incumbrances affecting the same, and which it should be necessary to pay and satisfy, upon trust to apply the same, or a competent part thereof, in or towards payment of the principal moneys and interest for the time being due to them upon security of the theatre and premises; and as to the clear surplus, if any, of the trust moneys, upon trust for Waters, his executors, administrators and assigns. And then it is provided that all or any of the trusts, powers, or authorities agreed or intended to be created or declared, in and by the deed or deeds, to be executed in pursuance of the present indenture, should and might be exercised and performed previously to the execution of such deed or deeds.

Now it was argued that, by the effect of this agreement, Birch & Chambers became trustees. The question is, whether they had become trustees before either of them had made the request to Waters to make the conveyance, or before they (without asking for an assignment in pursuance of the covenants) attempted to exercise any of the powers of sale given them by the deed? It appears to me that they are not trustees, but that they had that instrument executed by way of security only, and that they could not have become trustees, unless they had taken a conveyance from Waters, in consequence of their own request, which would have given them a power of sale, or unless, without a conveyance, they had taken upon themselves to execute a power of sale, which by the last proviso of this indenture it was declared that they should be at liberty to exercise without such conveyance. That that is the construction of that deed I am further inclined to think, because it appears that, in the deed of July 1819, to which Waters, Birch & Chambers and Mr Mayhew, together with certain other persons are parties, a certain declaration is made in case the Theatre or Opera-House with its appurtenances should, at any time before the said 5th day of July 1826, be sold or disposed of, either by Waters, his executors, administrators or assigns, or under any trusts, powers, or authority given or declared, or to be given or declared by him or them for that purpose; which shews that the parties contemplated that a power of sale, was in July 1819, vested in Waters, the owner of the equity of redemption; and it does not appear that, at any time, there was any step taken by Birch & Chambers, which could justify the court in saying that they, or either of them, had taken upon themselves to execute the powers given by the deed of 1817. My opinion therefore is, upon the construction of all these instruments taken together, that, in August 1821, Chambers the survivor of the two partners in this banking concern (Birch having died early in that year) stood merely in the situation of a person who had a security, upon the Opera-House, of an equitable nature, with a power of sale.

## Tooth *v.* the Dean and Chapter of Canterbury.

3 *Simons*, 49.

THE Dean and Chapter of C. being rectors of a parish, leased all the tithes belonging to the rectory: the lessees filed a bill for tithe of hops, against the occupiers, to which the Vicar was made a party as claiming that tithe. The occupiers then file a cross bill against the Dean and Chapter and their lessees, for a discovery and production of documents: Demurrer by the Dean and Chapter, allowed.

May 13, 1829.

## Day *v.* Drake.

3 *Simons*, 64.

IN general, a landlord can not be made a defendant to a bill, for tithes, against his tenants. But if he is charged with having got into his possession, from his tenants and other persons, documents, for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, the landlord can not demur to the bill.

The landlord may be joined with his tenant as a defendant to a bill for tithes, where he has documents in his custody a discovery of which is sought by the bill in aid of the the plaintiff's claim.

*Qu.* Whether a court of equity can make a decree to establish the right to tithes.

February 24, 1825.

## Oldman *v.* Slater.

3 *Simons*, 84.

A testator after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S. S. and his heirs. Held that S. S. was entitled to the fund for payment of the annuity, as well as to the house and furniture.

A bequest of a reversionary interest in personality to an executor, affords a presumption that the testator intended to exclude him from the residue. But parol evidence is admissible to rebut the presumption.

May 20, 21, 23, 1829.

WILLIAM WATSON made his will, dated the 21st of October 1811, in the following words: "First I give to the poor of Glamford Brigg 20*l.*, and to the poor of West Halton 20*l.*, to be divided by the overseers, church and chapelwardens, in each place, to be paid by my

executor soon after my decease. Item, I give to Lucy Oldman, in the parish of Browton, 10*l.* a year, during her natural life, to be paid half-yearly. Item, I give to Jane Osborne, of Clentworth, 50*l.* a year, during her natural life, to be paid half yearly; also Elizabeth Emmit, 50*l.* a year, during her natural life, to be paid half-yearly, also Coats Osborne, 500*l.*, also Harrison Osborne, son of John Osborne, late of Hull, 500*l.*, when he attained the age of 21: Also my friend Jeremiah Simpson, No. 7, King's Bench Walk, Temple, 500*l.* Item, I give to my dearly beloved wife, 1,200*l.* a year, during her natural life, also my furniture and the house and premises, where we now live, and after her decease, to my friend Samuel Slater, of North Carlton, and his heirs for ever. I further give a power to my friend Samuel Slater, after the death of my dearly beloved wife, to sell and dispose of the houses in Brigg, and the land in Wrawley, and the money they are sold for, to our two god-daughters of Samuel Slater's, equally divided, at the age of twenty-one, whom I make the said Samuel Slater my whole and sole executor, as aforesaid, of this my last will and testament."

The testator made a codicil, dated April 1812, and which was as follows: "My wish is to settle my affairs as under, that is, to give some small legacies to save them the expense of legacy receipts, which I make no doubt my dear wife and executor will do the needful; the money in the Lincoln bank about 1,800*l.*, will do all, and my dear wife will have sufficient for housekeeping till my rent-day." The testator then gave some pecuniary legacies, and proceeded thus: "William Oldman to have a note from Mr Slater for 200*l.* and to pay him interest till he comes of age." The next codicil, which was dated the 7th April 1812, was in the form of a letter to Mr Slater. It was as follows: "My dear Sir,—the papers you will find with my will, if I should not get May month over, to pay those legacies and the sums to my friends. I think there will be sufficient left, for my dear wife, for housekeeping, and there will be the Brigg rents due May-day, also the Drainage.—N. B. I desire my dear wife may have all the cash in the Lincoln bank, and what is due upon interest, more than the payment of what sums have ordered to be paid, for her to do all the needful: desire my friend Mr Giffard will assist you." The third codicil appeared to be without date; it was in the following words: "My dear Mr Slater,—In the month of May next, you will see my intention to such people and sums of money to save the legacy receipts, I desire you will do the same, with my dear wife and Mr Giffard's assistance. I wrote you there was 1,800*l.* in the Lincoln bank to settle all and pay the legacy's to the girl, and plenty to spare for my dear wife, God bless her." The testator's wife died in October 1812; and, in December 1813, the testator died.

The bill was filed, by the testator's next of kin, against the executor, to have the usual accounts taken of the testator's estate, and the residue divided between the plaintiffs. The defendant, by his answer submitted that the testator had given the residue to him, by appointing him the whole and sole executor of his will, and added that he should be able to prove that it was the testator's intention that he should take the residue, for his own use, as such executor.

The defendant accordingly entered into the following evidence:
Mr Rudkin deposed that he was intimately acquainted with the tes-

tator for about four years previous to his death: That he had attended the testator, in the capacity of surgeon and apothecary, from March 1812 to the time of his death, during which period, the testator, at several times, spoke to him as to the disposition of his property: That the first conversation which took place, was between March and October 1812, on which occasion the testator said to him that the defendant was a man of good property, but that at his, the testator's, death, he would be well off: That, on another occasion, the testator speaking of his property, said that, at his death, the defendant would be independent: That, on another occasion, after the decease of the testator's wife, the testator said to the witness that, at his decease, the defendant would have a considerable part of his property: And that, on several other occasions, the testator had made similar observations to him, the particulars whereof he could not set forth.

Elizabeth Slater, a daughter of the defendant, deposed that she was intimately acquainted with the testator, from her earliest recollection, to the time of his death; that, in the month of April 1812, she went to reside with the testator's wife, and continued to reside with her and the testator till the death of the testator's wife; and that during such period, the testator was in a bad state of health, and did not expect to survive his wife: That, in the month of April 1812, the testator, in her presence, said to his wife, that she was to send for the witness's father, in case of his death, that he might assist her in the management of the affairs, as, at her death, the property would be his, the defendant's, paying the legacies: That the witness continued to reside with the testator, after the death of his wife, to the time of his death: That, on the Sunday evening immediately preceding the testator's death, he said to her that he wished to alter his will, and leave her the house he dwelt in, and the furniture, and 600*l.* a year to support it; to which she replied that he certainly had the power to do so if he pleased, but that she did not wish to disturb him: That the testator, after a pause, said, "It is of no consequence, for every thing, after my decease, will be your father's and he can allow you to reside here if he pleases:" That, on the several other occasions, when the testator spoke to her, as to who would have his property at his decease, he gave her to understand that her father would have the bulk of his property: That, on the Tuesday evening immediately preceding the testator's death, he directed her to send for the defendant immediately upon his death, and assigned, as a reason for giving such direction, that he was so ill he could not recover; and that, when he died, the property would be the defendant's.

George Holgate deposed that the testator, in the summer previous to his death, came to his, the witness's dwelling-house, on which occasion a conversation took place between the testator and himself, in the course of which the testator expressed a wish that the witness's brother would marry Miss Slater, and said that, if he would marry her, he, the testator would give her 10,000*l.*, and then added, "I can do it, and there will be more than that left for my executor."

Mr Sugden and Mr Swanston, for the plaintiffs:

The questions are, first, whether the annuity of 1,200*l.* is given over, to the executor, on the decease of the testator's wife; second, whether he is excluded from the residue. By the will certain sums

are given to particular persons, for their lives, and are left to determine in the natural course. Then come the words on which the question turns: "I give to my dearly beloved wife," &c. What the defendant insists on is that he takes the 1,200*l.* a year absolutely; but it would be inconsistent to give him the 1,200*l.* a year, if the testator intended him to take all the property. The words "1,200*l.* a year" are followed by the words "during her natural life." The furniture and the house are distinct subjects of gift. What is given to him in fee, is the house to which the word "heirs" is properly applicable. The 1,200*l.* a year, therefore, drops with the life of the widow, as the other annuities do, with the lives of the persons to whom they are given. The annuity is a creation of the testator, and it is not a perpetual annuity; but is brought into existence during the life of the widow only. The house and furniture are of a distinct character: they were not created by the will. In disposing of them, the testator had only to name the parties who were to take. The terms of the will are fully satisfied by the construction which the plaintiffs put upon them, Smith *v.* Pybus, 9 Ves. 566.

The next question is whether the executor is entitled to take the residue beneficially. The expression "my whole and sole executor" can not have the effect which the defendant seems to attribute to it, see 2 Ves. jun. 475, 476. Then the will gives the executor a reversionary interest in the house and furniture; that is, sufficient to exclude him from any beneficial interest in the residue, Seley *v.* Wood, 10 Ves. 71; see pp. 75, 76. In that case Sir W. Grant says: "There is no doubt a reversionary interest, after a life interest, would exclude an executor, and more than a direct and immediate legacy," &c. That case came under the consideration of Lord Eldon, in Lynn *v.* Beaver, 1 Turn. & Russ. 63; and, in that case, his Lordship held that the gift of a contingent reversionary interest was sufficient to exclude the executor. Then we come to the parol evidence, upon the sufficiency of which the executor's claim rests; for, if that evidence had not been entered into, the court would have been bound to make a decree in favour of the next kin. Testimony of this nature, in order to have the effect for which it is produced, must apply, directly, to the question, what the testator intended when he made his will. The executor must prove that the testator, when he made his will, intended him to take beneficially; but not a word of the evidence relates to what the testator had done by his will, Trimmer *v.* Bayne 7 Ves. 508. All the declarations have reference to a very different period; the weight to be given to them depends wholly on the time when they were made. Those that were made before the will, go for little, those that were made afterwards, go for less; and those only are material which are contemporaneous with the will, Langham *v.* Sanford, 2 Mer. 6. There is not a particle of evidence as to contemporary declarations; and yet the court is called upon to put a construction, on the will, directly the reverse of that which it would adopt, if the evidence were rejected. The whole contents of the will and codicils, plainly show that the testator was most anxious to provide for his wife, and that he thought that she would take his residue; and there is not a word, in any of them, that shows any intention in favour of the defendant. The expressions which the testator is represented to have used by the witnesses, Rudkin and Holgate, with respect to the improvement that would take place in the defen-

dant's circumstances after his death, might have reference to the house and furniture, which he had given him by his will. As to the evidence of Miss Slater, the court will not make a decree on the testimony of a daughter, on account of the influence with which she must have been affected. Upon the whole we submit that there is nothing so decisive in the evidence, as to outweigh the intrinsic evidence of the will and codicils.

Mr Agar, Mr Preston and Mr Duckworth, for the defendant, the executor:

In that clause of the will in which the annuity of 1,200*l.* and the house and furniture are disposed of, there is only one word of gift: there is no repetition of that word; and the whole is one indivisible sentence, Fenny *v.* Ewestace, 4 M. & S. 58, Doe *v.* Westley, 4 Barn. & Cres. 667. The word "heirs" is here used: and that word has been held to mean executors, where it is used as to personal estate. The defendant is entitled to the fund which would have been required to pay the annuity: for a gift of the produce of a fund will pass the capital, Elton *v.* Sheppard, 1 Bro. C. C. 532. In Seley *v.* Wood there was an expression in the will which was alone sufficient to turn the executors into trustees. The testator, after appointing the executors, added: "If they will be so good as to do it." These words show that the testator did not conceive that he was conferring a benefit by appointing them his executors. Lord Eldon, in speaking of that case says: "Upon that case I can only say that it is singular in its circumstances, and I think I may add singular in its decision. I do not intend, by any means, to say that the decision may not be right: but if no more is to be found on the subject of reversionary interests, and, particularly, of contingent reversionary interests, that is a case which I should find some difficulty in following as an authority in the present instance," 1 Turn. & Russ. 69, Heron *v.* Newton, 9 Mod. 11.

Mr Sugden, in reply:

Throughout the will and codicils there is not a single word that, in the slightest degree, indicates that the testator intended, by appointing the defendant his executor, to give him every thing that was not disposed of. The first codicil shows, conclusively, that he did not think that he had given the residue, to his executor: for he begins it by saying; "my wish is to settle my affairs, as under." In the codicils the testator speaks of what will be left for his wife; but not of what will be left for his executor. Mr Giffard is requested to assist the defendant in the performance of his duty as executor. In short all the instruments show that the executor was not to take beneficially. In Newton *v.* Heron the direction that the executors should be kind to S. Tufton, assumed that they were to take beneficially.

Besides the annuity of 1,200*l.* there were other annuities given for life, without any direction that they should cease, or any funds provided for the payment of them. When he gives the annuity to his wife, he follows up the gift in the same way. When he gives the house and furniture, nothing is said about the life of his wife; but the gift is cut down by the words, "after her decease." The house and furniture were existing property: the annuity did not exist; and it is not to go beyond the actual period of its creation. If an annuity is created in

tail, and no remainder is limited, the entail can not be barred. Lord Eldon did not intend, by what he is reported to have said, in Lynn *v.* Beaver, to impeach the decision in Seley *v.* Wood.

The Vice Chancellor. There are two questions is this case; 1st, What is the true construction of the will, with regard to the gift of the annuity of 1,200*l.* 2d, Whether the executor is excluded from taking the residue beneficially.

The will is, evidently, made by an illiterate person. It commences in this manner: "I give to the poor of Glamford Brigg 20*l.*" &c. "also Elizabeth Emmit 50*l.* a year, during her natural life, to be paid half yearly." There are no further dispositions as to those annuities. Some money legacies are next given; and then the testator proceeds:—"Item, I give to my dearly beloved wife," &c., and the question, on that gift is, whether the testator has given, to Samuel Slater, that fund the produce of which is given to the wife for life. This was not an antecedent existing annuity of 1,200*l.*, but was created by the gift. But the testator has not followed the idiom of the English language; for there are no words of gift to the executor, except those that are found in the gift to the wife. The doubt which has arisen has been occasioned by the testator introducing the limitation of the enjoyment which the wife was to have, before he had enumerated all the subjects of the gift to her; and, had the sentence stood thus; "I give an annuity of 1,200*l.* and my furniture and the house where we now live to my wife, during her natural life," no doubt could have been raised that the annuity would have gone over with the other subjects of gift. The word "also" means "and." There is abundance of authority to show that, if the produce of a fund is given, the fund itself passes, Elton *v.* Sheppard, 1 Bro. C. C. 532. In Rawlings *v.* Jennings, 13 Ves. 39, the testator bequeathed, to his wife, 200*l.* per year, being part of the moneys he then had in bank security, entirely for her own use and disposal; and it was held that the wife took the fund absolutely. And in another case, Clough *v.* Wynne, 2 Madd. 188, which was decided by Sir T. Plumer, the testator, after giving several pecuniary legacies, gave the interest of the remainder of his property to his mother, for her life, and, at her decease to the plaintiff in the cause. It was there held that the plaintiff took an absolute interest in the property, subject to the life estate of the mother. It appears, therefore, upon the plain and easy construction of these words, and merely construing them as if they had stood in the order in which they would have been placed by the testator, if he had been more intimately acquainted with the English language, that there is a sufficient demonstration of intention to give that fund which would have been requisite for the payment of the annuity of 1,200*l.*, to Mr Slater; and I am of opinion that he is entitled to that fund.

The next question is, whether he is entitled to the residue beneficially. In Seley *v.* Wood, Sir William Grant intimated that the gift of a legacy in remainder would, *primâ facie*, raise a presumption that the testator did not intend his executor to take the residue beneficially. In Lynn *v.* Beaver Lord Eldon has expressed an opinion that it was so decided for the first time. But it appears to me that Lord Eldon has not expressly impugned the judgment of Sir William Grant in the case referred to; but has only intimated that it was the first decision upon

the point, and that the case before him was not a case to which it was applicable. In my own mind, there is no distinction between a valuable gift of personal estate in reversion, and a minuter gift in possession. If a gift of 10*l.* in possession will exclude the executor from taking the residue beneficially, why should not a gift of a larger sum in reversion have the same effect. Now as no case has expressly overruled Seley *v.* Wood, I take that case to be law. The consequence is that the gift of a legacy in reversion, does not necessarily exclude, but only raises a presumption against the executor taking. Now it is laid down, in Gladding *v.* Yapp, 5 Madd. 56, that, if a will contains an express declaration that the executor is to be a trustee of the residue, evidence can not be received against that declaration; but, if there be no express declaration of trust in the will, and only circumstances which afford inference or presumption of trust in the executor, there parol evidence is admissible to rebut that inference or presumption. Now there is, as it seems to me, no reason for rejecting the parol evidence in this case: and, as it proves that it was the intention of the testator that the executor should have the whole of his property, subject to the burdens imposed on it by the will and codicils, I am bound to decide that the defendant is entitled, to the residue, for his own use and benefit, and consequently that the bill must be dismissed; see 1 Will. 4, ch. 40.

## Parry *v.* Ashley.

3 *Simons*, 97.

A testator charged his real estate with an annuity to his widow, and subject thereto, devised it to S. A. in fee, and appointed her his executrix. The testator had insured a house. Policy expired a few months after his death, and was then renewed by S. A. Soon afterwards the house which was the whole of his real estate was burnt down. The insurance money was ordered to be paid into court on a motion by the widow, in a suit instituted by her against S. A. for the administration of the testator's estate.

June 4, 1829.

PHILIP PARRY, by his will dated the 30th of November 1821, after reciting articles of separation between himself and his wife, whereby he had agreed to pay to her an annuity of 80*l.* during her life, devised and beqeathed all his real and personal estates, subject to and chargeable with the payment of the annuity, to the defendant, Sarah Ashley, her heirs, executors, administrators and assigns, and appointed her sole executrix of his will.

In November 1828 the testator died, and, in the same month, Sarah Ashley proved his will, and entered into possession of his real estate, and possessed herself of all his personal estate. After the testator's decease, the annuity became in arrear, upon which the bill in this cause was filed, by the widow, charging that the defendant Ashley was not possessed of any property except what she took under the will, and that she was wasting and misapplying the assets, and praying that the will might be established, and the trusts thereof performed, that the usual accounts might be taken, that the plaintiff's annuity might be paid and

[Parry *v.* Ashley.]

the future payment thereof secured, that a receiver might be appointed to get in the outstanding estate of the testator, and that the defendant might be restrained from receiving the personal estate and the rents of the real estates.

In May 1829, after the bill was filed and before the defendant had put in her answer, a tavern of which the testator was seised at the date of his will and at his death, and which constituted the whole of his real estate, was burnt down. It appeared that the testator had insured the house for 1,200*l.*, and the furniture and other effects therein for 800*l.* The plaintiff, accordingly, filed a supplemental bill alleging that, if the defendant was permitted to receive those sums, the plaintiff would be in danger of losing the benefit to which she was entitled under the will, and praying that the Insurance Company (who also were made defendants) might be ordered to pay, the sums due on the policy, into court, and might be restrained from paying, to the defendant Ashley, and that she might be restrained from receiving, those sums.

The plaintiff now moved for an injunction, against Mrs Ashley and the Insurance Company, in the terms of the prayer of the supplemental bill, and that the Insurance Company might be at liberty to pay the sums due on the policy, into court. The motion was supported by an affidavit, made by the plaintiff, and verifying the abovementioned allegations in the bills.

Mrs Ashley made an affidavit, in which she stated that the testator had no real estate except the tavern, but that he was possessed of some personal estate; including part of the furniture and effects in the tavern, but not of considerable value: That, for some years previous to the testator's death, she was in possession of the tavern, as a tenant to the testator: That the greater part of the furniture and effects, and all the stock therein belonged to her: That she possessed herself of the testator's personal estate, but not of considerable value: That, in February 1819, the testator insured the tavern and the furniture and effects therein, for the sums before mentioned, and continued to pay the premium up to his death: That, in November 1826, she became tenant of the tavern to the testator, and purchased and paid for part of the furniture and effects: That the testator continued to pay the premium for her benefit: That the policy expired on the 25th of March 1829, and that, on the 19th of the same month, she renewed it out of her own money. And she submitted that, therefore, the money due on the policy, would not belong to the testator's estate, but to her, and more particularly such part thereof as was due in respect of the furniture and effects. She denied that, if she were permitted to receive the insurance money, the same would be wasted or misapplied, for that she intended to apply the same in rebuilding the tavern and restoring the furniture and effects, by which means the plaintiff's annuity would be amply secured; and she said that she had no means of rebuilding the tavern, or of paying the annuity, except with the insurance money: and she denied that she was an insolvent or irresponsible person, or that she had misapplied the testator's assets.

The Solicitor-General and Mr Stuart for the plaintiff, in support of the motion, cited Norris *v.* Harrison, 2 Madd. 268.

Mr Tinney for the defendant, Mrs Ashley.

Mr Phillimore for the Insurance Company.

The Vice-Chancellor. In this case the testator has created a general charge, by way of annuity, in favour of the plaintiff, upon all his real and personal property, subject to which it is given to the defendant Mrs Ashley, who is also made executrix. I shall not enter into the question whether she was bound to renew the policy of insurance, or not. The fact is that she, being the executrix, did renew it, and therefore I must hold that, *primâ facie*, she renewed it in the character in which she was entitled to renew it, namely, as executrix. The inclination of my opinion is that the proceeds of the policy can not be considered as part of the testator's general personal estate, but that they are affected with a trust for the benefit of the parties interested in the real estate. And, *primâ facie*, there is so much ground for holding that the proceeds of the policy are a substitution for the property charged, that the order ought to be made according to the notice of motion.

Motion granted.

## Leith *v.* Wildman.

3 *Simons*, 101.

On 19th April 1828 plaintiff obtained an order to withdraw replication and amend, and amended accordingly. In 1829, he obtained, as of course, another order to amend. Motion to discharge the second order refused, the first having been made before the new orders came into operation.

June 19th, 1829.

## Noel *v.* Bewley.

3 *Simons*, 103.

In 1711 a mortgage, for a term of years, was made to A. In 1712 a mortgage in fee of the estate, was made to S. in trust for A. In 1714 the term was assigned to C. in trust for A. to attend, &c. and then the equity of redemption, in fee, was conveyed to A. In 1717 A. reciting that he was seised in fee subject to a lease for 99 years made by a prior owner, grants and confirms that lease. Subsequent owners in their wills and deeds, used terms adapted to pass the legal estate, granted leases for long terms and exercised other acts of ownership. A reconveyance of the legal fee was presumed.

A contingent remainder-man conveyed his interest to secure a debt; the remainder was afterwards destroyed by the tenant of the prior estate; the remainder-man afterwards acquired a new interest in the property, under the will of that tenant. Held that it was available to the creditor.

June, 22d, 1829.

BY an indenture of the 31st January 1711, and made between Thomas

Edwin, of the first part, Joseph Webb, of the second part, and John Askew of the third part, in consideration of 600*l.* paid by Askew to Edwin, being the debt of Webb, Edwin assigned and Webb confirmed, the manor and advowson of Liddiard Millicent, and certain other hereditaments in Wiltshire, to Askew, for the remainder of a term of 498 years, which commenced in the year 1710, subject to redemption on payment of 600*l.* and interest. In March 1711, Webb charged the premises with the payment to Askew of the further sum of 400*l.* and interest.

By indentures of lease and release of the 23d and 24th of May 1712, made between Sir J. Tillie of the first part, Webb of the second part, and John Shiers of the third part, after reciting a prior mortgage in fee of the premises made by Webb to Sir J. Tillie, Tillie in consideration of 166*l.* 13*s.* 6*d.* which was then due to him upon that mortgage, and which was paid by Shiers, conveyed, and Webb released and confirmed the premises unto Shiers and his heirs, subject to redemption on payment of 166*l.* 13*s.* 6*d.* with interest.

By an indenture of the 16th of June 1712, and made between Webb of the first part, Askew of the second part and Shiers of the third part, after reciting the prior mortgage deeds, and that the 166*l.* 13*s.* 6*d.* was the money of Askew, and that the name of Shiers was only made use of in trust for Askew, and that Webb had borrowed, from him, the further sum of 813*l.* which, together with the sums before lent and the interest thereof to that time, made, in the whole, 2,000*l.*: Webb demised the premises to Askew, for the remainder of the term of 498 years, subject to redemption on payment of 2,000*l.* and interest, and Shiers covenanted that he, his heirs and assigns would, at the request of Askew, his executors, administrators and assigns, do all such acts as should be required for further assigning the trust created as aforesaid. In November 1712, Webb charged the premises with the payment, to Askew, of the further sum of 300*l.* and interest.

By an indenture of the 7th of June 1714, and made between Askew and Shiers of the first part, Webb of the second part, and John Casson of the third part, after reciting the prior deeds, and that the 2,000*l.* and 300*l.*, and interest had not been paid, and that Askew, had agreed with Webb for the purchase of the equity of redemption of the premises, Askew assigned the premises to Casson, for the residue of the term of 498 years, in trust for Askew, his heirs, executors, administrators and assigns, and to attend the inheritance: and Shiers covenanted that he, his heirs and assigns would stand seised of the premises conveyed and assigned to him, in trust for Askew, his heirs and assigns.

By indentures of lease and release of the 8th and 9th of June 1714, and made between Webb of the one part, and Askew of the other part, Webb, in consideration of 3,300*l.* 13*s.* 4*d.* paid to him by Askew, conveyed the premises to Askew, his heirs, executors, administrators and assigns. And Webb, covenanted that the premises were free from all incumbrances, except the term of 498 years.

Askew, who afterwards became Sir John Askew, Knight, continued in possession of the premises so conveyed to him, till his death. By his will, dated the 6th of August 1739, he devised the advowson of Liddiard Millicent to A. Kettelby, S. Cranmer and John Husey, in fee, upon trust, during the life of his daughter, Catharine Myers, to pre-

sent such person to the church as they and she should approve of, and, after her death, to present such persons as the heir male of her body and the trustees should appoint, and, for want of such heir, in trust for the sole direction and appointment of the trustees and their heirs and the right heirs of the testator: and he devised the manor of Liddiard Millicent, and all his other estates in the county of Wilts, and their appurtenances and all his estates situate in Broughton and Dunnerdale in Lancashire, and all his other freehold and copyhold estates in England, to his brother, Ferdinando Askew, his heirs and assigns, subject to the payment of his debts and legacies, and upon condition that F. Askew should not sell the manor or estate at Liddiard Millicent without the consent of the testator's executors, and that he should keep the same in repair, and maintain and keep all the privileges belonging to the same, and provided that he should, as soon as conveniently might be after the testator's decease, surrender all the estates in Broughton and Dunnerdale, and all the estates in Broughton which his mother held, after her decease, to William Myers, his son-in-law, to hold to the said William Myers, according to the custom of the manor: and, in case of Ferdinando Askew refusing to comply with the proviso, the testator declared his will, so far as it related to Ferdinando Askew, to be null and void; and, in that case, gave and devised the estate at Liddiard Millicent, to his executors their heirs and assigns, subject to the same restrictions and proviso: and he appointed Kettleby, Cranmer, Husey and William Myers executors of his will. Mrs Myers afterwards died without issue; and F. Askew then became the testator's heir. He continued in possession of the estates devised to him, till his death. By his will, dated the 2d Oct. 1782, he devised the advowson unto and to the use of his grandson Sir Charles Burrell Blunt, his heirs and assigns, and all his other hereditaments, to his wife, Mary Askew, for life, and, after her decease, to his daughter Mary Blunt, and her assigns, for life, with remainder to the use of all and every of the children of his son-in-law Henry Blunt, on the body of his daughter Mary Blunt to be begotten, as should be living at the time of the decease of the survivor of his wife and daughter, as tenants in common, in fee, and, in default of such issue, to his own right heirs.

Ferdinando Askew died in October 1783, and, upon the decease of Mary Askew, which happened in November 1784, Mary Blunt, who was the only child and heir of F. Askew, entered into possession of the estates as tenant for life under her late father's will.

Sir C. B. Blunt, who was the only child of Henry and Mary Blunt, having become indebted to the firm of Sir G. Noel & Co. bankers in London, by an indenture dated the 30th of December, 1802, and made between Sir C. B. Blunt of the first part, Noel & Co. of the second part, and Joseph Ward of the third part, after reciting the will of Ferdinando Askew, Sir C. B. Blunt granted, unto and to the use of Ward and his heirs, the remainder of him Sir C. B. Blunt, expectant on the decease of his mother in the event of his surviving her, of and in the capital messuage of Liddiard Millicent and the other estates late of Ferdinando Askew, upon certain trusts for securing to Noel & Co. the sums which they had then advanced, or might thereafter advance for Sir C. B. Blunt; and Sir C. B. Blunt covenanted, for further assurance, in the usual manner.

[Noel *v.* Bewley.]

In March 1813 Noel & Co. filed a bill against Joseph Ward and Mary Blunt (Sir C. B. Blunt being then resident abroad), praying for an account of what was due to them in respect of the balance of their account with Sir C. B. Blunt, and that the trusts of the indenture of the 30th of December 1802 might be carried into execution. After Mary Blunt had put in her answer to this bill, the suit was abandoned, by agreement between the parties.

By indentures of lease and release of the 1st and 2d of July 1817, and made between Mary Blunt of the one part, and Samuel Waller of the other part, after reciting that Mary Blunt was desirous of barring all contingent remainders in the manor and hereditaments devised to her by the will of Ferdinando Askew, she conveyed the manor and other hereditaments to Waller in fee, in trust, to reconvey the same to her in fee; and, by indentures of the 3d and 4th days of the same month, the reconveyance was made accordingly.

Mary Blunt, by her will dated the 8th of March 1820, after reciting the indentures of July 1817, devised the manor and other hereditaments comprised in those deeds, and all her other estates in Great Britain, to Benjamin Bewley and John Champion Waller, in fee, upon trust to sell so much thereof as they should deem necessary, and out of the moneys to arise by such sale to pay her debts, and funeral expenses, or so much thereof as her personal estate should be insufficient to pay; and she declared that her trustees should stand possessed of such part of the manor and other hereditaments as should not be sold, and of the residue of the money to arise by such sale, and the residue of her personal estate, after payment of her debts and funeral expenses, upon trust to pay two third parts of the yearly produce thereof, from time to time as the same should be received, into the hands of her son, Sir C. B. Blunt, during his life: Provided that his receipt only should be a good discharge, to the trustees, for the annuity, and that the same should be for his personal maintenance and support, and without any power for him to anticipate or encumber the growing payments thereof, or to dispose of the same, and so that the same might not be liable to his debts, contracts or engagements: And, as to the remaining one-third part of the said yearly produce, during the life of her son, to pay the same to her grandson William Oakes Blunt; and, after the decease of her son, upon trust to convey so much of the estate as should then remain unsold, and to transfer the securities on which the moneys produced by the sale should be invested, to W. O. Blunt absolutely; and she appointed Benjamin Bewley and J. C. Waller her executors.

Mrs Blunt died in January 1822, leaving Sir C. B. Blunt and William Oakes Blunt her surviving.

On the 14th May following Sir G. Noel, and the other parties then entitled to the balance due from Sir C. B. Blunt, on his banking account, filed a bill against the executors and trustees of Mrs Blunt's will, and also against Sir C. B. Blunt and William Oakes Blunt, charging that the contingent remainder of Sir C. B. Blunt, under the will of Ferdinando Askew, was not barred by the deeds of July 1817, because F. Askew, at the time he made his will, had not the legal estate in the hereditaments thereby devised, but that the same was then outstanding, either in John Shiers or John Casson, or his heir or devisee, as a trustee for F. Askew, and that, therefore, Mary Blunt could not

destroy the contingent remainder, the same being preserved by the outstanding legal estate: That if the contingent remainder was destroyed by the deeds of July 1817, Sir C. B. Blunt and William Oakes Blunt ought not to derive any benefit under Mrs Blunt's will: That those deeds were executed for the sole purpose of defeating the trust-deed of the 30th December 1802, and where a violation of the agreement under which the prior suit was abandoned: That the plaintiffs ought not to be deprived of the benefit of the trust-deed, but ought to be declared entitled to whatever interest Sir C. B. Blunt and William Oakes Blunt took under Mrs Blunt's will. The bill prayed that Bewley and J. C. Waller might be decreed to deliver up, to the plaintiffs, the possession of the estates devised by Mary Blunt's will, and that Sir C. B. Blunt and William Oakes Blunt might account to them for the rents and profits since the death of Mary Blunt: but in case the court should be of opinion that the indentures of July 1817 had the effect of barring the contingent interest of Sir C. B. Blunt, then that the plaintiffs might be declared entitled to the interest of Sir C. B. Blunt and William Oakes Blunt under the will, and that all proper directions might be given for effectuating, as far as possible, the trusts of the deed of the 30th of December 1802, and the payment of the demand of the plaintiffs.

The defendants Bewley and Waller set forth, in their answers, all the deeds and instruments before stated, which were executed prior to the death of Sir John Askew, and submitted that, under the circumstances, Ferdinando Askew had, or ought to be presumed to have had the legal estate in the premises at the time when he made his will; and they also submitted that the plaintiffs were not entitled to any relief against them in a court of equity, or, if the plaintiffs had any right against them in the estates in question, that they ought to establish such right, at law, before they could be entitled to any relief in equity.

A witness, examined for the defendants Bewley and Waller, deposed that Mrs Blunt and her husband occasionally resided in the mansion house in Liddiard Millicent, and that she acted, in every respect, as the owner of the estate, and as lady of the manor: That he once went, with one of the gamekeepers, to a neighbouring town, to apply for a certificate, in the name of Mrs Blunt, as lady of the manor: That all the repairs on the estates were done by her orders, and paid for by her; that the rents of the farms were paid to her; and that she gave directions for felling timber on the estates.

Counterparts of leases of different parts of the estates were also produced, at the hearing of the cause, on the part of the defendants. The first of these leases was dated in November 1717, and made between Sir John Askew of the one part, and Thomas Gardiner of the other part, and after reciting a lease of part of the estates made in 1713, by Joseph Webb to Gardiner, for ninety-nine years, and that some doubt had arisen whether Webb had good right to grant that lease, but that Sir John Askew being then entitled to the reversion and inheritance of the demised premises expectant on the determination of the term of ninety-nine years, had agreed to confirm it, Askew demised, ratified and confirmed the premises, to Gardiner, for the remainder of the term of ninety-nine years, at the rent and subject to the convenants reserved and contained in the recited lease.

[Noel *v.* Bewley.]

Another of the leases so produced was dated in 1730, and contained a demise, of a cottage and small plot of ground, for two years. The other leases were made by Mr and Mrs Blunt, and contained demises for sixty years, if Mrs Blunt should so long live.

The Solicitor-General and Mr Bridger, for the plaintiffs, said that a conveyance of the legal estate could not be presumed in this case, as the effect of such a presumption would be to destroy an estate, and would therefore be against right: That the court had not sufficient evidence before it to enable it to come to that conclusion: That the defendants ought to show to whom they would presume the reconveyance to have been made: That the circumstances of the ancestors of Mrs Blunt living on the estate, and granting leases, and of her taking out a certificate in the name of the gamekeeper, were not sufficient to afford the presumption; but that a course of dealing with the property ought to be shown, in which it was assumed that the party had the legal estate: That a reconveyance to Sir John Askew, who was the purchaser, could not be fairly presumed, and that the presumption could not be made after the date of F. Askew's will: That the fee simple of the estate was placed on the same footing as the term which was vested in Casson; and, as a surrender of the term could not be presumed, so neither could a reconveyance of the fee: That, at all events, the plaintiffs were entitled, under the covenant, by Sir C. B. Blunt, for further assurance, in the deed of 1802, to have the interest which he took under Mrs Blunt's will, conveyed to them, Mrs Blunt having given him that interest, in order to repair the wrong which she had done him by destroying the contingent remainder, Taylor *v.* Debar, 1 Ca. Ch. 274; and 2 Ca. Ch. 212; Morse *v.* Faulkner, 1 Anst. 11; Seabourne *v.* Powell, 2 Vern. 11: That, in the first of those cases, the title under which the new estate was acquired, was in direct opposition to the title to the original estate, and that, therefore, a stronger authority could not be cited.

Mr Pepys and Mr Bethell for the defendants Bewley and Waller, contended that the evidence which had been given and the documents which had been produced, on the part of the defendants, were sufficient to authorize the court to presume a reconveyance of the legal estate; and that, therefore, the contingent remainder limited, to Sir C. B. Blunt, by the will of F. Askew, was destroyed. They cited Hillary *v.* Waller, 12 Ves. 239, Emery *v.* Grocock, Madd. and Geld. 54, and Cooke *v.* Soltau, 2 Sim. & Stu. 154*.

Mr Bickersteth, for the defendant, W. O. Blunt.
Sir C. B. Blunt still remained out of the jurisdiction of the court.

The Vice-Chancellor: The first question in this case is, whether under the circumstances which appear in evidence, I am at liberty to presume that there was a reconveyance of the legal estate, it having been admitted that the contingent remainder, limited by the will of Ferdinando Askew, would be barred, by the deed of 1817, unless the legal estate was outstanding.

* See Mathews on Presumption, 207, *et seq.*; and Sugd. Vend. 324, 8th edit.

Now, with respect to that, it appears that, in the year 1711, a mortgage term became vested in John Askew, and, in 1712 a mortgage in fee was made to a person of the name of Shiers, and, in June of the same year, Shiers declared that the money secured by the mortgage so made to him, was the money of Askew, and that his name was only made use of in trust for Askew, and that he would do all such acts as should be required, by Askew, for further assigning the trust. Then, in 1714, previous to Askew's purchasing the equity of redemption in fee, the term is assigned to Casson in trust for Askew, and to attend the inheritance; and, shortly afterwards, the equity of redemption is conveyed to Askew; so that there was no further benefit to arise, to the owner of the inheritance, from keeping the legal estate outstanding.

It appears, by the recital in the lease of 1817, that there had been a lease previously made, by the person who was the owner of the estate, prior to the conveyance to Askew, and that some doubt had arisen, in the mind of the lessee, whether the lease was a good one; and then it is recited that Askew, being the owner of the reversion and inheritance expectant on the determination of the lease, had agreed to confirm it, and, accordingly, he uses general terms of confirmation and grant, for the purpose of setting up that prior lease for 99 years. That was a clear act of dominion, and of such a nature as that it could not answer the object of the lessee unless it passed the legal estate, and therefore, it seems to me to afford a strong reason for presuming that the legal estate was not outstanding. Then there were subsequent leases granted, not merely from year to year, but for long periods of time; and it is fair to infer that those leases were intended to comprise that which, upon the face of them, they appear to pass. And, if any thing is to be deduced from the terms used in the deed of 1802, it appears to me that that deed does, of itself, afford a strong inference that the legal estate was not outstanding; because it commences with a recital that Ferdinando Askew, by his will, which was duly executed, gave and devised unto and to the use of Mary Askew, &c. The intention of the grantor to convey the contingent remainder is next recited, and that remainder is then conveyed unto and to the use of the trustee, his heirs and assigns. The parties, therefore, acted on the supposition that Ferdinando Askew had the legal estate, he having devised it to uses, and that the legal estate in the contingent remainder was capable of being limited to the use of a trustee.

It appears to me therefore that there is sufficient, in this case, to authorize me to presume that the legal estate was not outstanding, so as to make this a legal contingent remainder.

Then inasmuch as, in the year 1802, Sir C. B. Blunt did convey the contingent remainder in fee, as a security for a debt, and Mrs Blunt having thought proper to destroy it, and having devised the whole inheritance to trustees, upon trust to sell, if they thought proper, and having declared that, if they did sell, the trusts of the money to arise from the sale, after satisfaction of certain demands, should be to pay two-thirds of the whole to Sir C. B. Blunt for life; and if the estate was not sold, that it should go in the same manner, the question is, whether, now that Mrs Blunt is dead, and Sir C. B. Blunt has an interest under her will, the plaintiffs can effect that interest which he so has. Now it strikes me that any interest which Sir C. B. Blunt

might acquire in the estate which he professed to convey by the deed of 1802, would be operated upon by the covenant for further assurance in that deed; and, therefore, inasmuch as the contingent remainder was destroyed, and, in lieu of it, he received a different interest in the land, he is bound, in equity, to make good his covenant.

But I do not place much reliance upon the covenant for further assurance; because I take the law to be this; that if a person has conveyed a defective title, and he afterwards, acquires a good title, this court will make that good title available to make the conveyance effectual.

The distinction between the cases cited and the present case, appears to be this; that, in the former, the parties who made a conveyance for a valuable consideration, had a defective title, and were supposed to have a good one, and that that title, originally defective, was, either wholly or partly, made void by some subsequent circumstances. But, in the present case, Sir C. B. Blunt actually had the title that he professed to have, and conveyed what he had and professed to have, namely, a contingent remainder. But then it turns out that, by the act of his mother, the contingent remainder was destroyed, and by her act he reacquires an interest in the estate. I can not however think that the circumstance of the party conveying what he really had, can make any substantial difference as to the relief to be afforded, in this court, to the grantee. It appears to me, therefore, that, to the extent in which Sir C. B. Blunt has an interest under the will of Mrs Blunt, it ought to be made available to the satisfaction of the debt of the plaintiffs.

The defendants, Bewley and Waller, are brought before the court as the depositaries of the legal estate; with them the plaintiff has no contract; and he must pay their costs. As regards Mr W. O. Blunt, he has no interest in the subject, and the bill must be dismissed, as against him, with costs. The decree will go on to direct the costs to be subsequently paid out of the fund.

"This court doth declare that the plaintiffs are entitled to the interest of the defendant Sir C. B. Blunt, in the two equal third parts and shares of the yearly produce of the manor, lands, hereditaments and premises in the pleadings of this cause mentioned, and devised to the defendants B. Bewley and J. C. Waller, by the will of Mary Blunt deceased, bearing date the 8th of March 1820, and that the said defendants B. Bewley and J. C. Waller are trustees thereof for the benefit of the plaintiffs: And this court doth order and decree that it be referred, to one of the masters of, &c., to take an account of what is due, to the plaintiffs, from the said Sir C. B. Blunt in respect of any moneys lent and advanced, to him, by the plaintiffs, and secured by the indentures of the 29th and 30th days of December 1802, in the pleadings mentioned: And it is ordered that it be referred, to the said master, also to take an account of the yearly produce of the manor, lands, &c. which have been received, by the said defendants, or any person or persons, &c. since the death of the said testatrix Mary Blunt and of their application thereof: And it is ordered that the said master do inquire and state, to the court, whether there were any and what debts due, from the said testatrix Mary Blunt, at the time of her death,

and whether the same or any part of the testamentary or funeral expenses of the said testatrix remain unpaid; and, for that purpose, the said master is to be at liberty to cause advertisements to be published, &c.: And it is ordered that the said master do ascertain and state to the court, what part or share of the rents of the said manor, lands, &c. so received by the said defendants, belongs to the plaintiffs in respect of the interest of the said defendant Sir C. B. Blunt therein: And it is ordered that it be referred to the said master to tax the defendants their costs of this suit, the costs of the said defendants B. Bewley and J. C. Waller, as between solicitor and client: And it is ordered that the plaintiffs do pay, to the said defendants, what shall be taxed for their costs, and upon payment of the costs of the said defendant W. O. Blunt, it is ordered that the plaintiff's bill do stand dismissed, out of this court, as against him: And this court doth declare that the plaintiffs are entitled to be reimbursed, what they shall pay for the costs of the said defendants, out of the moneys to be coming and payable, to them, by the defendants B. Bewley and J. C. Waller, in respect of the interest of the said defendant Sir J. C. Blunt under the will of the said Mary Blunt as aforesaid: And for the better taking of the said accounts," &c.

Reg. Lib. B. 1829, fol. 2468.

## Monkhouse *v.* Monkhouse.

3 *Simons*, 119.

Bequest to J. A. for life, remainder to his eldest son, for life, and to remain entailed on the eldest son of J. A and his posterity for ever. But in case of the death or want of issue of J. A. to M. (a brother of J. A.) and his descendants as above mentioned from one generation to another for ever. J. A. survived the testator and died a bachelor: Held that the bequest over to M. and his decendants was void for remoteness.

July 22, 24, 1829.

THOMAS ATKINSON by his will, dated the 29th of May 1790, disposed of the residue of his personal estate as follows:

"Respecting all my half share and interest in the concern of the Sirhowy works, and the profits arising, or that may arise therefrom, as well as of all my other property of what nature or kind soever, not hereinbefore or hereinafter disposed of, I give to my executors hereinafter named; and it is my will that my executors dispose of my property at Sirhowy works, as well as my property elsewhere, and that the amount thereof be placed in the funds, or on freehold security; respecting the interest arising therefrom, it is my will that one third part thereof be paid, to my brother William, during his natural life, and, after his demise, to his wife Jane, during her natural life, if she survives him and continues unmarried; and, as to one other third part of the interest arising therefrom, I give the same to my sister, Mary Lindow, during her natural life, and to her husband William Lindow, if he survives her and keeps again unmarried, during his natural life; and, as to the remaining third part of the interest arising therefrom, I

give the same to my sister, Dorothy Wilson, during her natural life. And, when the right of the parties before named, shall expire, by their deaths or second marriages, then I give the interest of my property to John Atkinson, son of the Rev. Matthew Monkhouse and my niece Bridget, during his natural life, and after his death, to his eldest son lawfully begotten, during his natural life, and to remain entailed on the eldest son descended from the same John Atkinson and his posterity, from one generation to another, for ever. But in case of death or want of issue from the said John Atkinson, I give the interest of the property aforesaid, to the second son of Matthew Monkhouse and my niece Bridget, and to his descendants as above mentioned, from one generation to another, for ever. And, in case of his death or want of issue, to the third son, or, if no son, to a daughter (she taking the name of Atkinson) and to her descendants in manner before mentioned."

The testator died in December 1791, and left all the persons in his will named, him surviving. William Atkinson, Mary Lindow, and Dorothy Wilson, were his next of kin. Matthew Monkhouse and Bridget his wife had three children born at the date of the will, namely, John Atkinson Monkhouse, Matthew Monkhouse, and William Jackson Monkhouse, and five children born after the date of the will.

Matthew Monkhouse, the father died in December 1822, leaving the plaintiff Bridget Monkhouse his widow and executrix; and she had also become the personal representative of William Atkinson and of the testator. By an indenture, dated the 10th of October 1810, John Atkinson Monkhouse assigned to his father, Matthew Monkhouse, all his property and interest under the testator's will. J. A. Monkhouse died in May 1814, intestate, and without having been married. He left his father his sole next of kin, and Matthew Monkhouse, his eldest brother, William Jackson Monkhouse, his second brother, and two other brothers and three sisters surviving him. At the time when the bill was filed Matthew Monkhouse, the younger, was married, but had not had a child; William Jackson Monkhouse also was married and had three children, the eldest of whom, William Monkhouse, an infant, was one of the defendants in the cause. In March 1820, Matthew Monkhouse the son, became bankrupt, and, by an indenture, dated the 2d of January 1824, William Jackson Monkhouse, who was the assignee under the commission, assigned, to the plaintiff, Bridget Monkhouse, all the bankrupt's interest under the will of the testator.

The bill was filed, by Bridget Monkhouse, against Matthew Monkhouse, the younger, William Jackson Monkhouse, William Monkhouse, and James Leman who was the administrator of the testator's two sisters. It alleged that the plaintiff was in possession, as the personal representative of the testator, of 3,200*l.*, being the value of the testator's residuary personal estate, which she was desirous of applying according to the will. The bill charged that the whole of the interest, of the defendant Matthew Monkhouse and his assignee, in the 3,200*l.*, was vested, in the plaintiff, under the indenture of the 2d of January 1824: That the defendant William Jackson Monkhouse contended that, in the event of the defendant Matthew Monkhouse never having issue, or all such issue dying in his life time, he, William Jackson Monkhouse, would become absolutely entitled to the 3,200*l.* under the testator's will, on the death of Matthew Monkhouse: That it was con-

tended, on the behalf of the infant defendant William Monkhouse, that W. J. Monkhouse having been born before, or at the time of the testator making his will, W. J. Monkhouse would not, in the event last mentioned, be entitled to more than a life interest in the 3,200*l.*, and that the infant defendant, in the event of his surviving his father, would become absolutely entitled thereto: That it was contended, on behalf of the next of kin of the testator at the time of his death, that the limitations or bequests over to the second and third sons of Matthew Monkhouse the father and their issue, were too remote and void, being after an indefinite failure of issue of John Atkinson Monkhouse, and that the testator died intestate as to the residue of the premises, after the life interest given to John Atkinson Monkhouse, and that the legal personal representatives of the brother and sisters of the testator mentioned in his will, who survived him, and were his sole next of kin at the time of his death, were entitled to the 3,200*l.*, and, in which event, the plaintiff, as the legal personal representative of William Atkinson, would be entitled to one third part of the 3,200*l.* Whereas the plaintiff charged that she was the legal personal representative of Matthew Monkhouse the father, and, as such, that she was entitled to whatever interest John Atkinson Monkhouse was entitled to in the premises, and that she was the purchaser, for a valuable consideration, of all the interest of Matthew Monkhouse, the son, and she submitted that, in the events which had taken place, she, in right of Matthew Monkhouse the son, had become absolutely entitled to the whole of the premises, or that, in the event of his having any legal issue born, she would, according to the true construction of the will, become absolutely entitled thereto in right of Matthew Monkhouse the son, under the indenture of the 2d of January 1824. The bill prayed that the trusts of the will might be carried into execution, and that the rights and interests of all the parties entitled under the same, or as the legal personal representatives of the next of kin of the testator at the time of his death, might be ascertained and declared. And that the 3,200*l.* might be paid to or be secured for the benefit of the parties entitled thereto.

The defendant Matthew Monkhouse, by his answer, submitted that, inasmuch as John Atkinson Monkhouse never had any child, the limitation over contained in the will took effect, and that he became entitled, under the will, to an absolute estate, or, at all events, to an estate, for his life, with remainder to his eldest son in tail, in the property in question; and that, never having (for the reason stated in his answer) duly assigned his interest under the will, and his debts having been long since paid, he was entitled to the enjoyment of such interest as, in the opinion of the court, he might be entitled to. The other defendants made such claims as were alleged in the bill.

Mr C. Romilly, for the plaintiff, contended that the gift to John Atkinson Monkhouse would have given him an estate tail in a real estate, and consequently that he took an absolute interest in the property in question.

Mr Horne and Mr Phillimore, for the defendant Matthew Monkhouse:—

John Atkinson Monkhouse took a life interest only under the will;

and the limitation over to Matthew Monkhouse, the second son, is good, for it ceases to take effect in case of the death, or want of issue of John Atkinson Monkhouse, consequently the limitation to Matthew, took effect on the death of John Atkinson; for Matthew took as a substitute for the child of John Atkinson, who would have taken if there had been one.

(The Vice-Chancellor:—Supposing the limitation over to Matthew to be good, what estate would he take?)

Matthew would take the absolute interest; for the limitation to him would have given him an estate tail in a real estate. The gift to John Atkinson is restricted to his life; but the gift to Matthew is to him and his descendants for ever.

(The Vice-Chancellor:—How could Matthew take an absolute interest, if John Atkinson did not? It is a gift to Matthew and his descendants as above mentioned. Does not that mean *eodem modo?*)

Mr William Brougham, for the defendant William Jackson Monkhouse:

I claim an absolute interest in the property, subject to Matthew's life estate. The word "or" must be construed "and": and the will must be read as if the testator had given the property to John Atkinson, for life, and, after his death, to his eldest son and his issue, but if he should die without issue, then to Matthew, for his life, with remainder to his eldest son in tail. The words "descendants as above mentioned" connect the second bequest with the first. The gift over in case of want of issue of the tenant for life, does not mean a general failure of issue; Bamfield *v.* Popham, 1 P. W. 54; Blackborn *v.* Edgley, 1 P. W. 600. Matthew therefore takes for life, with remainder to his eldest son in tail; but, when we come to the third son, the residue is left to him, absolutely. Therefore William Jackson Monkhouse takes the absolute interest, subject to the life interest in Matthew and the contingency of the property vesting in his son.

Mr Koe for the defendant William Monkhouse, said that the sons of the testator's niece took, successively, life estates only; and that, after the death of William Jackson Monkhouse, the property would vest, absolutely, in his son.

(The Vice-Chancellor:—There is no gift, either expressly or by reference, to the children of the third son.)

Mr Bagshawe, for the defendant James Leman:

All the limitations subsequent to those to John Atkinson and his children are void, as being too remote. If John Atkinson had left two sons, and the eldest had died without issue, the second son could have taken no interest." The words "for want of issue," mean a failure of issue of all the descendants of the first taker; consequently, the next of kin of the testator at his death became absolutely entitled, subject to the life estate of John Atkinson Monkhouse.

The Vice-Chancellor:—I should like to pause before I give an opinion upon the bequests in this will. With respect to the assignment to the plaintiff, there is no question upon it.

The Vice Chancellor:—In this case the question turns on a be-

quest in the will of Thomas Atkinson [His Honor here read the Will]. The first question is, what person was intended to take after the death of John Atkinson Monkhouse.

The testator has, in express terms, given the property, after the death of the father, to his eldest son during his life, and to remain entailed on the eldest son descended from the same John Atkinson, and his posterity, from one generation to another for ever. Now, inasmuch as John A. Monkhouse had no eldest son at the death of the testator, those words must be construed so as to make the sons tenants in tail in remainder expectant upon the decease of their father. The testator has not spoken of any son except the eldest; but it appears that he meant all the sons of John Atkinson Monkhouse to take: for, in the bequest to Matthew, his expression is, "and to his descendants, as above mentioned:" and therefore, though he has not mentioned the general descendants of John Atkinson, it must be taken as if he had given the property to John Atkinson, for life, with remainder to his first and other sons in tail. And, as there is no gift over, except in the event of the general failure of issue of the sons of J. Atkinson Monkhouse, the bequests over are void for remoteness. The expression "in case of death or want of issue, must be construed "in case of death and want of issue." The consequence is that, subject to the life estate of John Atkinson Monkhouse, the testator's property must be considered to have been undisposed of, and it now belongs to the testator's next of kin.

## Wagner *v.* Mears.

3 *Simons*, 127.

Pauper plaintiffs who had been guilty of vexatious conduct in the suit, ordered to be dispaupered.

July 25th 1829.

## Jeudwine *v.* Agate.

3 *Simons*, 129.

Obligees in a bond held entitled to be paid out of the assets of a deceased obligator, a sum exceeding the penalty of the bond.

July 28th, 1829.

BY indentures of lease and release, dated the 3d and 4th of February 1772, being the settlement on the marriage of Thomas Jeudwine with Penelope Paice, a freehold estate at Finchampstead was settled to the separate use of Penelope Paice, during the joint lives of her and Thomas Jeudwine, and, in case she should die in his lifetime, and there should be issue of the marriage living at her decease, to Thomas Jeudwine, for

life, and, after the decease of the survivor, to the use of all the children of the marriage as tenants in common in tail, with cross remainders between them in tail, with remainder as Penelope Paice should appoint, with remainder to her in fee.

By an indenture of the 4th of February 1772, one undivided moiety of certain leasehold hereditaments, was, in consideration of the intended marriage, assigned to trustees, in trust for Penelope Paice, for life, and in case Thomas Jeudwine should survive her, and there should be issue of the marriage then living, in trust for Thomas Jeudwine, for life, and, after the survivor's decease, in trust for all the children of the marriage then living, as tenants in common.

The marriage was afterwards solemnized; and there was issue of it three children, namely, T. G. Jeudwine, and the plaintiffs, Mary Penelope Jeudwine and Anne Jeudwine. During the minority of the plaintiffs, Mr and Mrs Jeudwine sold and assigned the undivided moiety of the leaseholds, for 1,600*l.*, which was laid out in the purchase of 2,424*l.* 4*s.* 10*d.* consols, in the names of trustees, upon the same trusts as were declared, of the moiety of the leaseholds, by the indenture of assignment of the 4th of February 1772; and the plaintiffs, on attaining twenty-one, confirmed the sale.

T. G. Jeudwine died a bachelor, and intestate, in his mother's life time. She died in February 1810, leaving her husband, and the plaintiffs her only issue and co-heirs her surviving. She did not make any appointment under the power reserved to her by the release of February 1772; and, consequently, the plaintiffs became entitled, subject to their father's life-estate, to the freehold estate, and bank annuities.

In the year 1813, Thomas Jeudwine proposed, to the plaintiffs, to relinquish in their favour, his life-estate and all his interest in the freeholds and bank annuities, and that the freeholds should be conveyed, to trustees, in trust to sell, and to invest the proceeds upon government or real securities, in the names of the plaintiffs and the trustees, in trust for the benefit of the plaintiffs and their children, with such contingent reversionary interest to Thomas Jeudwine, as after mentioned; and he further proposed to make up the income of the freeholds and bank annuities to such amount as that each of the plaintiffs should receive, during their lives, the clear, annual sum of 200*l.*, provided the plaintiffs should concur in the proposed settlement, and thereby abridge their interests in the freeholds and bank annuities, and give, to Thomas Jeudwine, a reversionary interest therein. The plaintiffs acceded to this proposal; and thereupon, by indentures of lease and release, of the 14th and 15th of January 1813, after reciting the indentures of lease and release of February 1772, and, that Thomas Jeudwine had become seised, for his life, in possession, and that the plaintiffs had become seised, as tenants in common in tail, in remainder, with the immediate reversion in fee expectant thereon, of the hereditaments comprised in those indentures, and that T. Jeudwine and the plaintiffs had mutually agreed to convey those hereditaments to Boughey Burgess and Thomas Holloway, in fee, in trust to sell, and apply the moneys arising from the sale, and the rents and profits thereof, in the mean time, upon the trusts declared by the indenture next hereafter mentioned; Thomas Jeudwine and the plaintiffs, in consideration of the agreement, and for other good causes and considerations, conveyed the freehold premises to Burgess

and Holloway upon trust to sell the same. By an indenture of the 15th of January 1813, and made between Thomas Jeudwine, of the first part, the plaintiffs, of the second part, and Burgess and Holloway of the third part; after reciting that T. Jeudwine, in consideration of his natural love and affection for the plaintiffs, and in order to make an immediate provision for their support and benefit, had agreed to relinquish, to them, all his estate and interest, as well in the freehold premises, as in the bank annuities, and that, thereupon, it was agreed between them that the freehold premises should be conveyed to Burgess and Holloway, in trust to sell, and to place out the moneys arising therefrom, upon the trusts after declared, and that it was, at the same time, agreed, between T. Jeudwine and the plaintiffs, that the bank annuities should be transferred, into the joint names of the plaintiffs and of Burgess and Holloway, upon the like trusts: it was declared that Burgess and Holloway should, after paying the expenses of the sale of the freehold premises, invest, the surplus moneys to arise from the sale thereof, on government or real securities, in their own names and the names of the plaintiffs, and that they and the plaintiffs should stand possessed of such securities, and of the 2,424*l.* 4*s.* 10*d.* consols, upon trust, during the life of the plaintiff Mary Penelope Jeudwine, to pay the interest and dividends of one moiety thereof, as she, notwithstanding any future coverture, should appoint, and, in default of such appointment, to her, for her separate use, and after her death, in trust for such of her children as she should appoint, and, in default of such appointment, in trust for all her children equally, to vest in sons at twenty-one, and in daughters at twenty-one or marriage, and, in case she should have no son or daughter who should become entitled to a vested interest, then in trust for the plaintiff, Ann Jeudwine and her children, in like manner; and similar trusts were declared as to the other moiety of the trust-property, for the benefit of the plaintiff, Ann Jeudwine and her children; and, if neither of the plaintiffs should have any child who should become entitled to a vested interest in the trust-property, then it was declared that the same should be in trust for Thomas Jeudwine: and it was further agreed that, until the freehold premises should be sold, the rents thereof should be applied as the dividends of the moneys arising from the sale would have been applicable, if the sale had taken place.

By a bond dated the 27th of February 1813, reciting the settlement of February 1772, and that T. Jeudwine, in consideration of his natural love and affection for his daughters, being desirous to relinquish to them his life-estate and all his right and interest in the freehold premises and bank annuities, it was proposed and mutually agreed between them that the freehold estate should be vested in trustees to be sold; and that the same had, by indentures of lease and release of the 14th and 15th days of January then last, accordingly been conveyed to Burgess and Holloway upon trust to be sold; and that it had likewise been agreed that the nett moneys which should arise from such sale should be laid out, in the joint names of the plaintiffs and of Burgess and Holloway, upon government or real securities, and that they should stand possessed thereof and of the 2,424*l.* 4*s.* 10*d.* consols, which had then been transferred to them, upon such trusts for the benefit of the plaintiffs and their children, as, by the indenture of the 15th of January then last, were declared thereof, and that Thomas Jeudwine, at the time of giving up

his life interest in the settled estates and trust-property, unto his daughters, as aforesaid, did also propose and agree to make up the rents and dividends of the freeholds and bank annuities to such an amount, yearly, as that each of his daughters should receive, during her life, the clear annual sum of 200*l.*; the condition of the bond was expressed to be that, when and so often as the rents of the freeholds, until the sale thereof, and the dividends of the stock in which the proceeds of the sale should be invested, together with the dividends of the 2,424*l.* 4*s.* 10*d.* bank annuities, should not produce, to each of the plaintiffs, the clear yearly sum of 200*l.*, during their respective lives, if T. Jeudwine, his heirs, executors or administrators, should pay the deficiency, to Burgess and Holloway, in trust for the separate use of the plaintiffs, then the bond should be void.

The freehold estate was not sold: and the rents of it, together with the dividends of the bank annuities, scarcely ever exceeded 170*l.* a year. T. Jeudwine not having made up the deficiency, Burgess and Holloway, in Easter Term 1815, sued him upon the bond; and, in Trinity Term following, judgment in the action was duly signed and docqueted, for 2000*l.*, being the penalty of the bond. The penalty was afterwards satisfied out of a sum of money which had been paid, into court, in a suit originally instituted by T. Jeudwine, against one Alcock, to compel the specific performance of an agreement which T. Jeudwine had made with him for the sale of an estate at Ewell; but the order was expressly made without prejudice to any further claim that the plaintiffs or their trustees might have on the residue of T. Judwine's estate, in respect to their annuities.

Thomas Jeudwine afterwards died; and, in Michaelmas Term 1819, the bill in this case was filed, by his two daughters, on behalf of themselves and his other creditors, against his personal representative and certain other persons, praying that the plaintiffs might be declared to be entitled to rank as judgment creditors of their late father, for the arrears of their annuities; that an adequate sum might be set apart, out of his real and personal estates, for securing the growing payments thereof, and that his real and personal estates might be applied in payment of his debts.

By the decree on the hearing, the master was directed to inquire what was the consideration of the bond on which the judgment in the pleadings mentioned, had been entered up, and what was due thereon. The master made his report on the 27th of June 1827, and thereby stated that, as to the consideration of the bond, no other evidence had been laid before him than the bond and the indentures of the 14th and 15th of January 1813 and the declaration of trust of the 15th of January 1813, and that, therefore, he was unable to state what was the consideration of the bond save as appeared by the bond and those indentures. The master found that the arrears of the annuities amounted to 573*l.* 13*s.* 10*d.* up to the 25th of March then last: and that the plaintiffs claimed to be allowed the full amount of those arrears, under the bond; but that 2,000*l.* had been paid to them by virtue of the order in the suit instituted against Alcock, whereby it was ordered that the said payment should be without prejudice to any further claim, of the plaintiffs or their trustees, on the residue of T. Jeudwine's estate, in respect of the annuities secured by the bond, if any such they had, or should

have: and the master was therefore of opinion that nothing was due on the bond.

Three exceptions were taken, by the plaintiffs, to this report: First, because the master ought to have stated that 573*l.* 13*s.* 10*d.* was due to the plaintiffs in respect of the bond, and that they were, in respect thereof, entitled, to such further sums and payments as might be necessary to make, from time to time thereafter, such annual sums of 200*l.* as mentioned in the instruments referred to by the report: Second, because the report did not state the plaintiffs to be creditors of Thomas Jeudwine, by speciality, whereas it ought to have found them so to be, in respect of the deeds and bond mentioned in the report: Third, because the report ought to have certified that the several thereinmentioned instruments executed by T. Jeudwine, or some of them, taken together, and, particularly, the recitals therein, or in some or one of them, contained evidence, or created a contract by speciality, for valuable consideration, on the part of Thomas Jeudwine, to make up and provide, to and for the plaintiffs, such annual sums of 200*l.* as aforesaid, and that the plaintiffs, were speciality creditors of T. Jeudwine, for 573*l.* 13*s.* 10*d.* and for the future payments, necessary to make up such annual sums of 200*l.* from time to time.

The Solicitor-General, Mr Knight and Mr Garratt, for the plaintiffs: In the case of a common money bond, interest is not given beyond the penalty. But that rule has no application to a case where there is an agreement independent of the bond. It is the established doctrine of this court that, where the performance of an agreement is secured by a penalty, a party can not deliver himself from the performance of the agreement by paying the penalty. Here the obligation is not created by the bond simply; but that instrument is accessory only to the contract of the father with his children. The transaction is fully recited in the bond; by which it appears that the children, in consideration of the father making up their incomes to 200*l.* a year, had reduced their interest in the property to which before they were absolutely entitled. The transaction then amounts to a sale at a particular price. Where a bond is given on a mortgage or a sale, it is merely an accessory; and, in the latter case, the vendor has a lien on the estate for the purchase-money. The bond is not merely evidence of the agreement by the recitals it contains, but the recitals amount to a covenant; Saltoun *v.* Houstoun, 1 Bing. 433. The plaintiffs can not stand in a worse situation than a vendor who has a lien on the estate for the purchase-money. Here there is a distinct, substantive agreement, which is not merged in the bond.

Mr Pepys and Mr Ching, for the defendant, Sarah Agate, the personal representative of Thomas Jeudwine.

The master has found that the bond is satisfied; and it is for the plaintiffs to make out that a bond given for securing an annuity, is not satisfied by payment of the penalty. If a party takes a certain penalty only, he must take it for better and worse. If a bond is given for securing a sum of money with interest, and the penalty is not sufficient to pay the arrears of interest, the obligee can make no further demand. The case of Mackworth *v.* Thomas, 5 Ves. 329, decides this case. The

instruments by which the arrangement between the father and his children was carried into effect, do not bind the father to give the children more than the property would produce. These instruments do not contain any recital of an agreement on the part of the father, to make up the income of his daughters to 200*l.* a year. They were executed a month before the bond.

The children can not take both the penalty and the annuity. Their claim is not presented to the court as arising under a contract, but as a debt. They can be entitled to receive nothing more, out of the produce of the estate, than the penalty. Under these exceptions the plaintiffs come in as creditors. The question is, debt or no debt. There is no debt here; for it has been paid. The exceptions must, therefore, be overruled; for the plaintiffs can have no claim to be considered as speciality creditors, the bond having been satisfied; and if they are entitled under the contract, they can claim only as simple-contract creditors. The plaintiffs can not claim as under a contract, without having the judgment of the court that it ought to be performed. The bond in this case has no resemblance to a bond taken as a collateral security. The whole transaction begins and ends with the bond. If a party has an annuity secured by a bond, can he come to this court and ask it to improve his security, and give him a decree for the specific performance of an agreement for the annuity? Supposing that the plaintiffs have a right to go out of the bond, they are not creditors at all. The settlement of the property was not any part of the consideration for the bond. The court must consider the provision as merely voluntary, and as arising from the bounty only of the father.

(The Vice-Chancellor:—The master finds the proposal on the part of the father to make up the incomes of his daughters to 200*l.* a year, as a fact.)

The master finds it only on the recitals of the bond. Natural love and affection is recited as the consideration for the settlement. The recitals negative the idea of the daughters being purchasers, for they state the proposals and agreement as being voluntary on the part of the father.

The Solicitor-General in reply:—It has been said that the deeds do not refer to the bond: but the master has found the deeds to be part of the same transaction. As the father relinquished his life-interest, the settlement appeared, on the face of it, to be made for valuable consideration; and, therefore, it was unnecessary to recite the bond. The plaintiffs have a right against the representative, which they had not against the testator; for they are entitled to compel an appropriation to be made, out of the assets, to secure the annuity. The recital in the bond does, of itself, constitute a debt or obligation. The master, though he will not place the plaintiffs in the rank of speciality creditors, has found that 573*l.* 13*s.* 10*d.* is due to them, for arrears.

Sir Charles Wetherell, Mr Horne, and Mr Bacon, appeared for other parties in the cause.

The Vice-Chancellor. The question, in this case, is whether the recital in the bond constitutes the plaintiffs creditors by contract, so as to entitle them to have a fund set apart out of the assets of the testator

for payment of their annuities. I shall take a little time to consider of this.

*July* 30.—The Vice-Chancellor. The only point on which I have to give judgment, is whether, inasmuch as the bond was given, in a certain penalty, for the purpose of securing such a sum as, with the rents and dividends of the settled property, would make up, to each of the plaintiffs, an income of 200*l.* a year, it is competent to the court to give them relief beyond the penalty of the bond.

Now by the decree, it was referred, to the master, to inquire and state what was the consideration of the bond, and whether anything, in effect, was due on the bond. The master has made a report, in which he has set forth the transactions which took place between the father and the obligees of the bond; and he has found, as a distinct fact, that there was a proposal and agreement that the freehold estate and personal property, in which the daughters were interested, should be re-settled so as to make a settlement on their children, and to give the father a reversionary interest; and it is stated also, as part of the same proposal and agreement, that in consideration thereof, the father was to secure, to his daughters that sort of annuity, which was to consist in the difference between the annual rents and proceeds of the property settled, and the sum of 200*l.*

It appears that an action was brought, on the bond, in consequence of there being an arrear, and that there was a sum recovered, and that, judgment having been entered up, the whole amount of what was due on the judgment, namely, the full penalty of the bond, was paid, but expressly, without prejudice to any further claim which the plaintiffs, or their trustees might have upon the residue of the obligor's estate.

Upon looking into the cases, it appears to me that the doctrine of this court is that, wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, (as in the case of Wienholt *v.* Logan, not yet reported), there, nothwithstanding the agreement appears in the form of a bond, with a penalty, the court will consider that the recital in the condition of the bond, is evidence of the agreement, and will not limit, the relief it gives, to the amount of the penalty.

It was stated, by the counsel for the defendant, that in the case of Mackworth *v.* Thomas, the court had expressly decided that, where a bond was given to secure an annuity, it would not give relief beyond the amount of the penalty. In point of fact, there was no such decision in that case. Because there a bill was filed for a general administration of assets; and the defendant, who was the executrix, set up a right to retain a sum which would be the amount of the arrears of the annuity secured by the bond, and which arrears, at that time, exceeded the penalty. Now, the Lord Chancellor, in deciding on the exception that was taken to the report in that respect, said that there the suit was for the administration of assets. But it does not appear to me that the Lord Chancellor at all decided that, if the executrix had filed a bill, and insisted upon her right to relief, she might not have been relieved: but all that he said was that, where a suit was for the administration of assets, (and there there was, clearly, a claim for assets, in

the way that the executrix put it forward) he could not relieve: and it does not appear to me that anything that was said in Mackworth *v.* Thomas, can be adduced as militating against what I have expressed to be my opinion as to the law of this court.

Inasmuch, therefore, as the master has, perhaps not in the most technical way, stated what was the consideration for the bond, but has stated enough to show what was the foundation upon which the parties treated, my opinion is, that the plaintiffs are entitled, in this court, to be considered as speciality creditors for as much as may remain due to them by virtue of the agreement which is recited in the condition of the bond.

It is not, perhaps, very material to the relief in this case, but it seems to me that the fact of the obligees having recovered judgment on the bond, can not place them in the situation of judgment creditors, in respect of the relief which is given them, not on account of the judgment, but on account of the recital in the condition of the bond.

Exceptions allowed.

By the decree on further directions, it was referred, to the master, to ascertain and certify what sum of money ought to be set apart to the two annuities of 200*l.* and 200*l.* mentioned in the bond, and the several other instruments referred to by the master's report: And the court declared that the plaintiffs, at the date of the report, were speciality creditors, of Thomas Jeudwine, for the sum of 573*l.* 13*s.* 10*d.*, and for the then future payments necessary to make up, from time to time, the said two annual sums of 200*l.*

## Dod *v.* Herring.

3 *Simons*, 143.

In an action brought against J. T. by the defendants, a verdict was taken against him for 10,000*l.* subject to an award. J. T. then became bankrupt, and afterwards the award was made, by which the amount of the damages was reduced. It did not appear that the assignees went in before the arbitrator: Held that they were not bound by the award.

November 3, 1829.

IN 1818, the defendants, Herring & Richardson, being the owners of a ship called the Francis & Eliza, entered into a contract to convey, several individuals who were then desirous of going to South America, to a port in that country, and to supply them with clothing and stores for the voyage. Some of the articles which Herring & Richardson procured, in order to enable them to perform this contract, were supplied by Thomas Thompson; and it was agreed between them that he should share with them in the risk and profits of the adventure. In or before June 1819, the contract was completed, and Herring & Richardson thereupon became entitled to receive a certain sum, subject, however, as the bill alleged, to account, to Thompson, for his

share thereof, which was to be ascertained by the proportion which his outlay bore to theirs. On the 22d of November 1827, a commission of bankrupt issued against Thomas Thompson and John Knight, under which they were found bankrupts; and the plaintiffs were chosen their assignees.

On the 6th April 1829, the bill was filed, praying that Thompson might be declared to be interested in the profits of the contract, in the proportion which the articles furnished, or advances made by him, bore to the article furnished or advances made by the defendants; that an account might be taken of the dealings and transactions relating to the contract, and that what was due to or from Thompson in respect thereof, might be asertained; that the defendants might be decreed to pay, to the plaintiffs, what should be found due to to Thompson's estate, the plaintiffs consenting that the defendants should prove, against Thompson's separate estate, what (if anything) might be found due to them.

On the 6th of July 1829, the defendants pleaded to the bill, that, in Hilary term 1826, they commenced an action of assumpsit in K. B. against Thompson, to which he pleaded the general issue, and gave notice of set-off; that the action was tried on the 23d of July 1827, when a verdict for 10,000*l.* and 40*s.* costs was taken, by consent, for the plaintiffs in the action; subject to the award of W. H. Maule, Esq.: that the arbitrator made his award on the 26th of February 1828, and thereby directed that the damages should be reduced to 4,242*l*; and accordingly judgment was entered up, as of Hilary term 1826; for 4,482*l.* being the amount of the reduced damages and costs.

The plea then averred that the particulars delivered in the action, by way of set-off, by Thompson, comprised every demand in respect of which the bill was filed: that those particulars, together with the causes of action declared upon by the defendants, comprised all the dealings and transactions ever had between Thompson and the defendants, whether alone or in conjunction with any other person or persons: that in the action and the arbitration, the agreement mentioned in the bill, and the gains and profits thereof, and the shares of the defendants and Thompson therein, and of all the advances of both parties in regard thereto and all accounts, dealings, and transactions relating to the contract, and the sums due to or from Thompson in respect thereof, were all fully and fairly brought before the arbitrator, and finally decided by his award: that every matter in respect of which the plaintiffs were, by their bill, seeking any relief against the defendants, was finally determined by the action, verdict and judgment.

The Solicitor-General and Mr Hull in support of the plea:

The averments in the plea show that the award comprised all the matters stated in the bill. The action was commenced in Hilary term 1826, and was tried in July 1827. The commission issued in November 1827, and the award was made in February 1828. Although the judgment was not entered up at the time when the commission issued, yet, when it is entered up, it has reference to the verdict. The very point has been decided in *Ex parte* Helm, 1 Mont. & M'Arth. 70, and *Ex parte* Poucher, 1 Glyn & Jam. 385.

[Dod *v.* Herring.]

Mr Rose and Mr Wakefield, in support of the bill:

The power of the arbitrator was revoked by the bankruptcy. If a party binds himself and his executors to abide by an award, the death of the party before the award is made, is a revocation of the arbitrator's authority, Blundell *v.* Brettargh, 17 Ves. 241. Before the award was made, the bankrupt was stripped of all his property, and it became vested in the assignees; they did not go before the arbitrator. The bankrupt might have been favourably disposed towards the defendants, or might have been indifferent as to the result of the reference, Marsh *v.* Wood, 9 Barn. & Cress. 659.

The Solicitor-General in reply:

Bankruptcy is not an abatement of a suit; it only stops it, that the assignees may be made parties. The verdict, if not cut down, will stand for the full amount. The assignees might have gone before the arbitrator if they had thought proper, Andrews *v.* Palmer, 4 B. & A. 250.

The Vice-Chancellor. In *Ex parte* Helm and *Ex parte* Poucher the question was not as to the proof of the debt, but as to the proof of the costs. In the present case, there was a proceeding going forward after the commission issued; and the question is whether the assignees can be bound by a proceeding to which they were not parties. My opinion is that, if the assignees choose to object to the proceedings, they shall not be bound by them: and, consequently, this plea must be over-ruled.*

## In the matter of Joseph Francklin's Charity.

3 *Simons*, 147.

A legacy of 50*l.* a year to be laid out in bread for the poor of a parish, is liable to the legacy-duty: although the poor were so numerous that no one received more than the value of 2*s.* per annum.

November 5, 1829.

* The following cases were cited, by the defendants' counsel, in addition to those mentioned in the text: Walker *v.* Barnes, 5 Taunt. 778; Blandford *v.* Foote, Cowp. 138; *Ex parte* Charles, 14 East, 197, and 16 Ves. 256; *Ex parte* Hill, 11 Ves. 646; Haswell *v.* Thorogood, 7 B. & C. 705; Scott *v.* Ambrose, 3 M. & S. 326. The defendants presented a petition in the bankruptcy, praying that proof of the 4,482*l.* (which the commissioners had rejected) might be admitted. The petition was heard before Lord Lyndhurst, C. together with an appeal, presented by the defendants, from the above decision. The Editor has been informed that his lordship allowed the debt to be proved, but did not decide the appeal before he resigned his office.

## Ashley *v.* Ashley.

3 *Simons*, 149.

A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B.'s executors then sold and assigned the policy to D. for nominal consideration, and then D.'s executors sell it to E. Held that they could make a good title to the policy, and that E. was bound to complete his purchase.

November 5, 1829.

IN 1802 William Heath insured his life, in the Equitable Insurance Office, for 1,000*l.* By a deed poll, dated the 10th of March, 1810, Heath, in consideration of 5*s.*, and for divers other considerations him thereunto moving, assigned the policy to James Hodsoll. In October 1810, Hodsoll died. In February 1815, a decree was made in a suit instituted by Heath and others, against Hodsoll's executors, under which the policy was sold, to General Ashley, for 320*l.*: and, in August of the same year, the executors assigned the policy to General Ashley. In August 1817 General Ashley died. In 1829 the policy was sold, to Charles Farebrother, under the decree in a cause instituted, by General Ashley's widow, against his executors. An order was afterwards made, on the application of Farebrother, for a reference to the master to inquire and state whether a good title could be made to the policy. The master reported in favour of the title. Forebrother excepted to the report; and General Ashley's executors presented a petition praying that the report might be confirmed; and that Farebrother might be ordered to pay his purchase-money into court, in trust in the cause. The exceptions and petition were heard at the same time.

The Solicitor-General and Mr Duckworth for C. Farebrother.

Assurances are annual contracts between the assurers and the assured. Heath had an interest in insuring his own life; but when it became a contract between Hodsoll and the office, Hodsoll had no interest, and therefore it was void; or, at all events, he had no interest beyond the 5*s.* paid by him as the consideration for the assignment;* Godsall *v.*

* By 14 Geo. 3, c. 48, it is enacted: that "no insurance shall be made on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning of the act, shall be null and void, to all intents and purposes whatsoever.

"II. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person or persons name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made.

"III. That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received, from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events."

Boldero, 9 East. 72. If a person having an interest in a life, insures it, and then sells the policy, and afterwards his interest in the life ceases, the assignee would not be able to recover a single shilling upon the policy. Next, it is not disputed that the assignment, by Heath to Hodsoll, was voluntary: and, therefore, Heath's creditors would be entitled to set it aside, at any time.

Mr Pepys and Mr Parker for the petitioners.

The Vice-Chancellor:—Unless this transaction is affected by the act of parliament, no objection can be made to it. By the 14th Geo. 3, c. 48, it is enacted, &c. [His honor here read the three first sections of 14 G. 3, c. 48.] Now there is not a word said here as to the assignment of policies. This policy was good at the time it was effected. By an instrument of the 10th of March 1810, an assignment of it was made; and, subsequently, the parties who had become entitled to the policy, sold it, for a valuable consideration, under a decree of the court; so that some person became entitled to bring an action, on the policy, in the name of the assured, Brown *v.* Carter, 5 Ves. 862; Prodgers *v.* Langham, 1 Sid. 133; and if such an action had been brought, there is not a word in the act of parliament to defeat it. The question is whether the dealing with the policy has been such as that a court of equity would compel the assured to permit the assignee to use his name, in bringing an action on the policy. It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action, in his name, for the sum insured.

The case cited is not applicable; for there the action was brought by the assured; and, at the time of the action brought, his interest had ceased; and, therefore, it came within the third section of the act of of Parliament.

## Freame *v.* Best.

3 *Simons*, 152.

In general a motion to amend a second time after answer can not be made without notice.

In what cases notice of a motion to amend a second time is not necessary.

November 3d, 1829.

Mr Koe moved to amend the bill a second time, after the answer had been filed. The motion was supported by the affidavit required by the 15th of the new orders, but no notice of the application had been given, and, on that account, the Vice-Chancellor refused to make the order.*

* The motion was afterwards made before Lord Lyndhurst, C., and was again refused. See a report of this case, upon both the applications, 1 Russ. & Mylne, 79. It seems, however, that, where the defendants are numerous, notice will be dispensed with; Cottingham *v.* Potts, 1 Russ. & Mylne, 81. So also where upon exceptions being allowed, the plaintiff moves to amend, and that the defendant may answer the amendments and exceptions at the same time, neither notice of the motion, nor an affidavit in support of

## Brookman *v.* Rothschild.

3 *Simons*, 153.

The plaintiff was a holder of 20,000 French rentes. The defendant resided in London, and dealt largely in foreign securities, and had contracted for the Prussian loan: he was also a partner with his brothers, who were bankers in Paris. The plaintiff employed the defendant to sell his rentes: the defendant, without the plaintiff's knowledge, purchased them for himself and his partners, but gave the plaintiff the market price. The plaintiff then purchased Prussian bonds of the defendant, and agreed that they should remain in his hands as a security for the purchase-money, which remained unpaid: but no bonds were appropriated for the plaintiff. The defendant, however, had always in his hands bonds to a greater amount. The plaintiff afterwards directed the defendant to sell the bonds, and the defendant subsequently informed the plaintiff that he had sold them accordingly; and he gave the plaintiff credit for the alleged price. The plaintiff than purchased 115,000 rentes of the defendant, which he was to pay for on a future day, and the rentes were then to be transferred to him: but no rentes were set apart for the plaintiff, or identified as belonging to him. Before the day of payment arrived, the defendant, by the plaintiff's desire, sent an order to his partners to sell the rentes, and they subsequently informed the plaintiff that they had sold them accordingly, and gave the plaintiff credit for the alleged proceeds. The accounts between the plaintiff and defendant were afterwards settled, and the plaintiff paid the balance which appeared due from him to the defendant. Four years afterwards the plaintiff, having discovered that the 20,000 rentes had been purchased by the defendant and his partners, and that there was no appropriation on the two other purchases, filed his bill to have all the transactions set aside, and the court decreed accordingly.

June 23, 26, 27, 29; July 16, 1829.

IN the early part of 1818, the plaintiff, who resided at Southampton, being possessed of 20,000 francs, French rentes, applied to the defendant, N. M. Rothschild, who resided in London, and was in the habit of contracting for foreign loans, and dealing in foreign securities, to recommend to him a house, in Paris, to receive for him the dividends on his rentes. Mr Rothschild recommended the plaintiff to the house of Messrs Rothschild, Brothers, of Paris, bankers, in which he was a partner, and the plaintiff gave them a power of attorney, and they received the dividends, and remitted them to the plaintiff, by a draft for the amount on N. M. Rothschild. On the 6th of April 1818, they wrote to the plaintiff, and informed him of the remittance, and charged

it, is necessary; Mendizable *v.* the King of Spain, before the Vice-Chancellor, 24th March 1830, upon the motion of Mr Wakefield.

In Hand *v.* Green, upon a motion to amend made by Mr Elderton, the question was, whether a plaintiff who had amended his bill before answer, could obtain an order to amend, after answer, without notice. On the 18th of April 1831, the Vice-Chancellor said that he had conferred with the Lord Chancellor, and that his lordship was of opinion, that where a bill has been amended before answer, it might be again amended, after answer, without notice, and that the 13th of the new orders did not apply to amendments before answer.

[Brookman *v.* Rothschild.]

him with commission. Some mistake having been made in the receipt of the dividends, a correspondence on the subject took place between the plaintiff and N. M. Rothschild, in the course of which the plaintiff applied to N. M. Rothschild to be admitted as an original subscriber to a loan which the latter had then recently contracted for, with the Prussian government, to the amount of 5,000,000*l.*, to be paid by instalments, at different periods. This loan was to be raised upon bonds, of the Prussian government, bearing interest at 5*l.* per cent., which were to be redeemed on or before the 30th of September 1847, by half-yearly payments, at certain rates per cent., commencing in 1818-19. Mr Rothschild consented that the defendant should become a subscriber to the loan to the amount of 2,000*l.*; and the plaintiff afterwards requested to be allowed to subscribe for twice the amount, which Mr Rothschild refused. The bonds were afterwards executed by the Prussian government, and each of them was numbered, and they were all delivered to Mr Rothschild. Messrs Dearman, Bell & Harford, who were the plaintiff's brokers, were employed by him to pay, to Mr Rothschild, the instalments on the amount of the loan for which the plaintiff had subscribed. The plaintiff, in the course of the before-mentioned correspondence also applied to become a subscriber to a French loan, for which N. M. Rothschild was a contractor; and, from time to time, inquired of him the price of French stock and Prussian bonds, and asked his opinion as to their probable rise or fall. Mr Rothschild, in a letter of the 18th of April 1818, recommended the plaintiff, if he had money disengaged, to invest it in Prussian bonds; and added, that he expected to see the loan at 90. At that time the loan, as far as could be ascertained, was at 82 or 83 per cent. The plaintiff having again written to Mr Rothschild for information as to the prices of French stock and Prussian bonds, Mr Rothschild, in a letter of the 23d of May 1818, and which partly related to the dividends on the plaintiff's rentes, added in conclusion: "French stock is here about 69; and Prussian bonds 82 to 83. I think you would do well to sell part of the former, and invest it in the latter." At this time the plaintiff knew that Mr Rothschild was a contractor for the French as well as the Prussian loan. On the 24th of May the plaintiff wrote, to Mr Rothschild, as follows: "Shall I beg the favour of you to cause my 20,000 rentes to be disposed of to-morrow, on the best possible terms, both as to the price and exchange. The produce you will have the goodness to retain in your hands, until I have determined how to dispose of it, unless there would be a saving of commission in purchasing Prussian bonds immediately with it; in this case, I would wish it to be immediately invested, and then the bonds can remain with you. Should the bonds be purchased, I hope that they may be obtained at about 82." On the 25th May, Mr N. M. Rothschild purchased the plaintiff's rentes, for the house of Rothschild, Brothers, of Paris, at 69, and at the exchange of 23 francs 90 centimes, and invested the proceeds in Prussian bonds, which he himself supplied out of his own stock, at 82½. On the same day, Mr Rothschild wrote, to the plaintiff, as follows: "Having had an opportunity to dispose of your 20,000 rentes, at 69, and 23.90, I have embraced the same, and beg to inclose you the last printed prices from Paris, by which you will perceive that, on the 21st, they were only 68.25, therefore I feel confident

you will approve of this transaction. I have invested the proceeds of the sale in Prussian bonds, say 19,000 bonds at 82½, which is the very lowest it could be obtained at; there will be one-quarter brokerage on the amount. I will thank you to let me have the inscriptions and power of attorney.* There will be interest, from this day, until the bonds are delivered, both ways, allowed on the French stock and charged on the bonds." There was a mistake, in this letter, in stating that the bonds purchased were 19,000, instead of 14,000; and the plaintiff was apprised of it on the 27th of May 1818. The plaintiff's brokers, Messrs Dearman, Bell & Harford, were employed in this transaction, and signed the usual broker's notes, and received one quarter per cent. commission, as a single commission on one transaction. On the same 25th of May, Mr Rothschild purchased 36,000 rentes, for the Paris house, from other persons, at 68 francs 25 centimes, at the same rate of exchange. The printed list of the prices of public securities, for the 26th of May (no list having been published for the 25th) stated the price of rentes to be 68 francs 50 centimes: and the plaintiff, on the 27th and 29th of May, and 1st of June, sold 5,000, 15000, and 9,000 rentes at 69, and at the same rate of exchange. The price charged for the Prussian bonds was also the current price of the day. Mr Rothschild had sold Prussian bonds, on the 15th and 23d of May, at 83, and the plaintiff had purchased Prussian bonds, of other persons, on the 6th of that month, at 84. On the 26th of May, the plaintiff sent an answer to the above mentioned letter of the 25th of May, and expressed himself thus: "I beg to return my best thanks for getting the transaction in the French funds and Prussian bonds effected so much to my advantage." Shortly after this transaction, French rentes rose, and Prussian bonds fell.

The plaintiff, in a letter written to N. M. Rothschild on the 13th of June 1818, observed that he had been very unfortunate in selling his rentes so soon; to which Mr Rothschild replied, on the 15th of the same month, that, in transactions of that nature, it was impossible to be always on the right side, as the fluctuations depended upon such numerous circumstances; that he firmly believed that Prussian bonds would be at 90 per cent., and that he should not be surprised to see it in a year; but that too depended on circumstances; that every thing then appeared favourable for it. On the 2d of June 1818, the plaintiff instructed his brokers, Messrs Dearman, Bell & Harford, to purchase, for him, 5,000*l.* Prussian bonds; and they purchased the same of Mr Rothschild, and sent the usual broker's note to the plaintiff; it was as follows: "London, June 2d, 1818. James Brookman, Esq. We have bought on your account, of N. M. Rothschild, Esq. 5,000*l.* Prussian 5 per cent. bonds, at 81¾ per cent., to be paid for in four months, with interest from the day of contract.—Dearman, Bell & Harford." On the 15th of the same month the plaintiff, bought, of Mr Rothschild, 40,000*l.* more Prussian bonds, at 82 per cent., at twelve months credit. The broker's note was as follows: "Jas. Brookman, Esq. We have bought on your account 40,000*l.* Prussian bonds of N. M. Rothschild, at 82 per cent. to be paid for at the option of the buyer within twelve months, allowing 5 per cent. interest, from day of contract to day of

* These were required for the sale of the rentes.

payment.—Dearman, Bell & Harford." In a letter written, by Mr Rothschild, to the plaintiff, on the 12th of June 1818, the proposal for the purchase of these bonds, was mentioned as having been made by the latter.

On the 15th of June, Dearman & Co. purchased, for the plaintiff, other Prussian bonds, to the amount of 10,000*l.* at 81 per cent. and at a credit of four months. Of these bonds, 5000*l.* were purchased of Mr Rothschild, and the remainder of Messrs S. and J. Ward. The broker's note of this last transaction also was sent to the plaintiff. The bonds so purchased from Mr Rothschild, amounted, in all, to 50,000*l.* of bonds, but as Mr Rothschild had paid part only of the instalments on them, to the Prussian government, it was agreed that he should pay the remaining instalments, that the plaintiff should pay interest on the amount advanced and to be advanced by Mr Rothschild in payment of the instalments, and that Mr Rothschild should hold the bonds for his security. In April and May 1818 the plaintiff had purchased, of other persons, 15,000*l.* Prussian bonds, and having to pay for part of them in September following, he, on the 18th of that month, borrowed of Mr Rothschild through Dearman, Bell & Harford, 8,500*l.*; and on the receipt of that sum, the brokers delivered to Mr Rothschild the plaintiff's promissory note for the amount, payable with interest at 5 per cent., and they also delivered to him 11,000*l.* of the 15,000*l.* Prussian bonds belonging to the plaintiff, as a collateral security for the 8,500*l.* and interest. After the delivery of these last-mentioned bonds Mr Rothschild ought to have had in his hands, Prussian bonds belonging to the plaintiff, to the amount of 61,000*l.* On the 7th of October 1818, Mr Rothschild paid, to the plaintiff, the half-year's dividend on that amount of bonds, which became due on the 1st of that month. In October 1818, the credit allowed on the two purchases of 5,000*l.* bonds, expired; but Mr Rothschild agreed to extend the credit as to them, so as to place them on the same footing as the 40,000*l.* bonds. On the 6th of October, (by which time Mr Rothschild had paid, all the instalments on the 50,000*l.* bonds to the Prussian government) an account was made out of what was due, to Mr Rothschild, in respect of those bonds; and it appeared that 41,522*l.* 4*s.* 10*d.* was due to him in respect thereof. The plaintiff not being able to pay that sum, it was agreed that the plaintiff should give Mr Rothschild his promissory note for 41,500*l.*, and that Mr Rothschild should retain the 50,000*l.* bonds as a collateral security for the amount of the note. Accordingly the plaintiff gave to Mr Rothschild his promissory note for 41,500*l.* and left the 50,000*l.* bonds deposited with him, as a collateral for the payment of that sum.

Mr Bell, who was examined for the plaintiff, as to this part of the transaction, deposed that he believed that it was not understood or agreed between the plaintiff and Mr Rothschild that the latter was to be at liberty to use, as his own, the 50,000*l.* bonds, but that those bonds were to be held by him, as the specific property of the plaintiff, subject to the payment of the 41,500*l.* and interest; and that as far as the plaintiff was concerned, these were real and *bonâ fide* transactions.

On the 15th of October 1818 the plaintiff, through the agency of Dearman & Co., borrowed, of Mr Rothschild, the further sum of

4,200*l.*; and, on the receipt of that sum, the brokers handed over, to him, the plaintiff's promissory note for the amount, and deposited with him 6,000*l.* Prussian bonds belonging to the plaintiff, as a collateral security. In these 6,000*l.* bonds were included 2,000*l.* of the 14,000*l.* bonds which had been delivered, by Mr Rothschild, to the plaintiff, in respect of the purchase of bonds to that amount, made on the 25th of May 1818; but it did not appear how the remainder of those 14,000*l.* bonds were disposed of. After this last deposit, Mr Rothschild ought to have had, in his hands, bonds belonging to the plaintiff, to the amount of 67,000*l.*

In December 1818, at which time Prussian bonds had fallen about 7 per cent., the plaintiff met Mr Rothschild near his house in London, as the plaintiff and Mr Bell were going thither, and Mr Rothschild, then recommended the plaintiff to sell his Prussian bonds, then in Mr Rothschild's hands, and to invest the proceeds in the French funds, and added that, by so doing he had no doubt that the plaintiff would repair the losses that he had sustained. In consequence of this advice the plaintiff sold, to Mr Rothschild, 37,000*l.* bonds, on the 17th of December 1818, at 75 per cent., and 30,000*l.* bonds, on the 31st of the same month, at the same price. Notwithstanding the 11,000*l.* bonds and 6,000*l.* bonds were included in these sales, Mr Rothschild had, previously to the 17th of December 1818, sold and delivered 11,000*l.* of those bonds, to other persons; the plaintiff, when he deposited those bonds, having consented to Mr Rothschild's using them if he thought proper so to do, on Mr Rothschild undertaking to give to the plaintiff bonds of equal amount, whenever required. The 11,000*l.* bonds so sold, were disposed of at about 76 per cent. Between the 18th and 29th of December 1818, Mr Rothschild sold 47,000*l.* of his own bonds, some at 75¼, and the remainder at 75 per cent.

Out of the proceeds of the 67,000*l.* Prussian bonds, Dearman & Co. paid to Mr Rothschild, the amount of the plaintiff's two promissory notes for 8,500*l.* and 41,500*l.* leaving the note for 42,000*l.* still unpaid. Mr Rothschild, having called upon the plaintiff to deposit other Prussian bonds, as a security to him, for the payment of that note, the plaintiff deposited, with him, such bonds, to the amount of 5,500*l.* On the 5th of February 1819, the plaintiff sold those bonds, to Mr Rothschild, at the price of 78¾ per cent., and the remaining promissory note was paid out of the proceeds. About a month after the 67,000*l.* bonds were sold as before mentioned, the price of Prussian bonds rose 3¾ per cent. As to the 50,000*l.* bonds, not one of them was ever looked out or selected from the other bonds in Mr Rothschild's hands, although he had at all times, bonds to that amount, ready to transfer to the plaintiff whenever he was entitled to call for the same.

Between the 17th of December 1818, and the 5th of February 1819, the plaintiff purchased, of Mr Rothschild, several sums of French rentes, at different prices, amounting, in the whole, to 115,000 francs of such rentes, and the purchase-moneys amounted, in the whole, to 65,649*l.* 0*s.* 8*d.* By the terms of the contracts, the plaintiff was to pay the purchase-moneys, with interest at 5 per cent. on or before the 15th of June, then next, (being the period at which the credit for the Prussian bonds would have expired), and was then to have the rentes transferred to him; and he was to be at liberty to call for an earlier

transfer, of all or any part of the rentes, on payment of the purchase-money for the amount. A broker's note, of each contract, was made out and signed by Dearman & Co. the plaintiff's brokers, in the usual form. As far as the plaintiff was concerned, these were real transactions; and, in April 1819, Mr Rothschild accounted, to the plaintiff, for the half-year's dividends, which had become due on these rentes in March preceding, after deducting his commission for receiving the same; and Messrs Rothschild, Brothers, of Paris, in letters which they wrote to Dearman & Co. in May 1819, spoke of the rentes as the plaintiff's. But the 115,000 rentes were never invested in the name of the plaintiff, nor were the same set apart for him, or in any manner identified as his property.

On the 26th of May 1819, the plaintiff sold, in London, through Dearman & Co. 5,000 of his 15,000 rentes, to a Mr Blakesley, and on Dearman & Co. paying to Messrs Rothschild the contract price for the rentes so sold, they were transferred, to the purchaser, by Mr Rothschild and his partners. Immediately afterwards, Mr Rothschild recommended the plaintiff to sell the remainder of his rentes in Paris, and advised him to send an express, to the house of Rothschild, Brothers, in Paris, for that purpose. The plaintiff accordingly caused his brokers, Dearman & Co. to write an order, to the house of Rothschild, Brothers, of Paris, to sell his remaining 110,000 rentes; and, on the 26th of May 1819, Mr N. M. Rothschild wrote a letter to Rothschild, Brothers, inclosing the order, and stating that the plaintiff had been very unfortunate in his speculations, and requesting them to do their best for him. This letter concluded as follows: "These rentes I sold to Mr Brookman, but they have not yet been invested in his name, therefore I hand you, at the foot, the particulars, amounting to 115,000 rentes: but you have only to dispose of 110,000 rentes, the other 5,000 rentes having been sold here, and I shall give an order for the transfer next Friday." An account of the prices at which the 115,000 rentes had been sold by Mr Rothschild to the plaintiff, was contained in a postscript. This letter was sent by express, according to Mr Rothschild's advice, and he charged the plaintiff 37*l.* 6*s.* 2*d.* for the expenses of it. Rothschild, Brothers, in a letter of the 29th of May 1819, sent to Dearman & Co. an account of the sales of the 110,000 rentes, by which it was represented that they had sold them, in different portions, at prices varying from 66 fr. 30 cents. to 66 fr. 60 cents. per cent.; and they stated that they had used their best exertions in the sales, and apologised for not remitting the proceeds on that day, on account of the scarcity of bills on London. This letter was received, by Dearman & Co. on or before the 2d of June 1819. In the account above-mentioned, the largest prices were given credit for on the smallest sums, and Rothschild, Brothers, made a charge of 9,132 francs for commission and brokerage. Upon this transaction the plaintiff sustained a loss amounting to 4,830*l.* 18*s.* 6*d.* On searching the government books in France, it appeared that sales of rents to the amount of 120,950 francs were effected by Rothschild, Brothers, on the 28th of May 1819; but it could not be distinctly ascertained whether the plaintiff's rentes were included in those sales. The plaintiff having expressed, to Mr N. M. Rothschild, his dissatisfaction at the low prices for which his rentes had been sold, Mr Rothschild, at his request, con-

sented that the credit should be extended three months, and that the money produced by the sales of the 110,000 rentes, and which still remained in the hands of Rothschild, Brothers, should be re-invested in the same stock. On the 8th of June 1819, Mr N. M. Rothschild wrote a letter to Rothschild, Brothers, containing the following passage: "I enclose you a letter from Mr J. Brookman, and have agreed that the 110,000 rentes shall, as far as the proceeds admit, be purchased again, without any charge of commission for this purchase. Therefore please to apprise him of such purchase; and I recommend you to do the best you can. You will please keep the rentes in your name, and bills will be drawn against it for three months, in order to secure the exchange."

On the 12th of June 1819, Rothschild, Brothers, wrote a letter to the plaintiff, in which they stated that, on the receipt of the letter of the 8th of that month, they gave orders, to their brokers, to lay out the plaintiff's money in their hands, in the purchase of 105,500 rentes for his account; that the rentes were purchased, in certain portions, varying, in price, from 68.60 to 68.70 per cent.; that the brokerage amounted to 1,811 francs 95 centimes; and they added: "We must heartily wish you success in this renewed operation, and that the event will fully justify the agreement you have made respecting it." In this purchase the highest prices were charged for the largest portions of rentes purchased. The plaintiff being dissatisfied with these prices, considering them not to be the fair market prices, Dearman & Co. by his desire, wrote, on the 22d of June 1819, to Rothschild, Brothers, and submitted to them that, considering the price at which the rentes had been purchased, there must have been some mistake in the instructions sent to them, or that they had not clearly understood those instructions, but had purchased the rentes, for time, and had given higher prices on that account.

On the 26th of June 1819, Rothschild, Brothers, replied to this letter as follows: "We have before us your favour of the 22d instant, and in reply beg to hand you enclosed an authentic course of the ready-money prices of rentes, on the 11th instant, the day on which Mr Brookman's order was received, and on which the re-purchase was made for him. He certainly has reason to regret the high prices, but, independent of our not feeling ourselves justified in deferring the execution of the order, we had no reason whatever to induce us to do it, as there was, at the moment, every appearance of a continued rise, and, although the rentes have latterly experienced considerable variation, yet they yesterday closed at 68.75, the highest course at which any part of the stock was re-purchased. Feeling, as we did, the most anxious desire that this operation should have terminated with advantage, we have experienced considerable pain from the result of it; but we can with truth say that, both in the sale and re-purchase, our very best exertions were used, and that circumstances alone have been unfavourable to us. We still hope that the re-investment of the amount, may, in the end, turn out well, and shall be most happy to do our best to contribute to it, whenever our exertions may be again called for."

The purchases of the 105,500 rentes could not be identified in the French government books. In September 1819, Mr Bell, by the direction of the plaintiff, applied to the defendant to obtain his consent that

the 105,500 rentes should be sold in London, in great or small amounts, as opportunity might offer: but the defendant refused to comply with the proposal, and advised the plaintiff that it would be more beneficial to him to have the rentes sold in Paris. The plaintiff acceded to this advice, and accordingly, on the 20th of September 1810, went, to Paris, with his broker, Mr Bell.

To a letter which Mr N. M. Rothschild addressed to Rothschild, Brothers, on the 15th of September 1819, was the following postscript: "Mr Brookman and Mr Bell the broker, intend visiting you respecting Mr Brookman's French stock. I will write you fully respecting this business, by my next." In a letter which Rothschild, Brothers, wrote to Mr N. M. Rothschild on the 20th of September 1819, there was the following passage: "Due attention will be paid to your cautions respecting Mr Bell and Mr Brookman." And in another letter of the 24th of September 1819 they wrote as follows: "We have settled Mr Brookman's concern, and will hand you the particulars to-morrow."

On the 21st of September 1819, the plaintiff had an interview at Paris with Mr James Meyer Rothschild, one of the firm of Rothschild, Brothers, when he gave instructions for the sale of his rentes. The plaintiff was informed that his rentes had been sold, by a letter from Rothschild, Brothers, of the 22d of September 1819, by which it appeared that he was a gainer, by the transaction, to the amount of 3,395*l.* 7*s.* 6*d.* That letter was as follows.

"*Paris*, 22d September 1819.

"Sir,—Agreeably to your verbal instructions we have the pleasure to announce the sale we have effected of your frs. 105,500 rentes, at 71.35 producing frs. 1,505,485,

| | |
|---|---|
| Deducting commission, ½ per cent. | frs. 7,527.40 |
| Brokerage, ⅛ ditto | 1,881.85 |
| | 9,409.25 |

remains net 1,496,075.75, which proceeds, at the exchange of 25.20, make 59,368*l.* 1*s.* 8*d.* sterling, which we remit to N. M. Rothschild, of London, in bills at 30 days' date from the 26th instant, thus closing the transaction per net appointment. Please to acknowledge receipt of the present, and believe us very sincerely,

"Sir, your most obedient servants,
"De Rothschild, Brothers."

"The dividend on the above rentes is to be added to our remittance, viz. on frs. 52,750.

| | |
|---|---|
| Commission ½ P. % | 263.75 |
| | 52,486.25 |

which at 25.20. is 2,092*l.* 15*s.* 9*d.* also to be remitted to N. M. Rothschild, of London, consequently together 61,450*l.* 17*s.* 5*d.* sterling."

"James Brookman, Esq. Paris."

[Brookman *v.* Rothschild.]

On the 25th of September 1819, Rothschild, Brothers, wrote another letter to the plaintiff, which was as follows: "Sir,—Referring you to our letter of the 22d instant, we hand you at foot a note of the sale and re-purchase of rentes which took place for you in the months of May and June, leaving balance in your favour of frs. 685.55, at 25.20, 27*l.* 4*s.* 1*d.* sterling, making the total amount of our remittance to N. M. Rothschild, 61,478*l.* 16*s.* sterling, at 30 days' date.

"We are, very truly, Sir, your most obedient servants,

"De Rothschild, Brothers."

| | |
|---|---|
| "May 29, sold frs. 110,000 rentes, producing | frs. 1,452,067.50 |
| "June, 12, bought 105,500, costing | 1,451,381.95 |
| "Balance frs. | 685,55 |

No bills were remitted on this occasion: but, on the 28th of October 1819, N. M. Rothschild debited Messrs Rothschild, Brothers, with the amount of proceeds of the sale of the 105,500*l.* rentes, and gave a corresponding credit to the plaintiff.

On searching the government books in Paris, it did not appear that De Rothschild, Brothers, had sold, between the 21st and 27th of September 1819, rentes to a greater amount than 10,430.

After the plaintiff's return from Paris, Mr N. M. Rothschild made out his account, in which he charged the plaintiff with the purchase-money for the 115,000 rentes, and with interest thereon, and gave him credit for six months dividends thereon, (after deducting ½ per cent. for commission), and he also gave the plaintiff credit for interest on those dividends, from the 9th of April to the 28th October 1819, and credit for the proceeds of the 5,000 rentes, sold to Mr Blakesley, and for interest thereon to the 28th of October 1819, and also for the remittance alleged to have been received, from Rothschild, Brothers, in respect of the sale of the 105,500 rentes. On this account a balance of 1,614*l.* 19*s.* 2*d.* appeared to be due, from the plaintiff, to Mr N. M. Rothschild; and, on the 10th of December 1819, the plaintiff gave Mr N. M. Rothschild a cheque on his bankers, for that balance. This finally closed all transactions and accounts between N. M. Rothschild and the plaintiff.

The plaintiff continued to buy and sell French stock during the whole of the following year, and employed Rothschild, Brothers, of Paris, as his agents, in those transactions: and, during 1821 and 1822, he bought and sold Spanish and Columbian bonds, shares in joint stock companies and other securities to a considerable amount.

In December 1823, he addressed a letter, to James Rothschild, of Paris, one of the firm of Rothschild, Brothers, in which, after apologizing for the intrusion, and attributing it to the urgency of pecuniary distress, he said that, upon looking over his papers lately, he had discovered that Messrs Rothschild had had the proceeds of the sale of the 110,000 French rentes, which they had sold for him on the 28th of May 1819, in their hands, from that day, till the 11th of June following, for which they had not allowed him interest, and requesting them to rectify that mistake. Messrs Rothschild answered, by a letter, stating that it was not their custom to allow interest for money lying

in their hands, liable to be called for at a moment's notice; and they believed their practice was general; but, at the same time they expressed their regret for the plaintiff's misfortunes, and enclosed him 50*l.* as a present.

On the 22d of January 1824, the plaintiff wrote a letter to N. M. Rothschild, in which, after stating himself to be in distress, he begged to call his attention to the contracts entered into between them in December 1818, and January and February 1819, and said that, by the terms of those contracts, he was to have had the option of selling the 115,000 rentes gradually in parts, upon paying Mr Rothschild for them, at the time of requiring their delivery, and that, when the time approached for their being sold, Mr Rothschild, had compelled him to sell them, altogether, in Paris, by which he had sustained a loss of 1,000*l.*, and he claimed compensation for that alleged loss. Mr Rothschild, conceiving this demand to be unfounded, rejected it; upon which the plaintiff again wrote to Mr Rothschild, stating that he had applied to a professional friend who, on being made acquainted with the transactions that had taken place between them, strongly advised him to file a bill, to oblige Mr Rothschild to answer, upon oath, various questions upon many points of those transactions, and upon the accounts which the latter had given in, and which the plaintiff had paid. The plaintiff added that, as the transactions and accounts involved questions of very great importance, he wished Mr Rothschild to be informed of his intention before he proceeded to file the bill, in order that he might have it in his power to propose some arrangement. Afterwards some correspondence took place between the plaintiff and Mr Rothschild's solicitors, but no arrangement was come to; and, on the 24th of April 1824, the plaintiff filed his bill against Mr N. M. Rothschild alone. The defendant having stated in his answer, that he carried on business in partnership with his brothers, and that all the dealings and transactions mentioned in the bill took place, so far as he was concerned therein, on the joint account of himself and his brothers, the plaintiff amended his bill, and made the brothers defendants.

The substance of the bill was, that Mr N. M. Rothschild was an agent or broker for the sale of foreign stocks and securities; that, in March 1818, the plaintiff employed him as his agent, in procuring the dividends on his 20,000 rentes to be received in Paris, and remitted to him in England: that those dividends were received by Rothschild, Brothers, and remitted to N. M. Rothschild, who paid them over to the plaintiff, after deducting his commission thereon: that, by that means, the plaintiff became acquainted with N. M. Rothschild; and the latter learnt that the plaintiff had property in the French funds: that N. M. Rothschild expressed a great desire to serve the plaintiff, and stated that he should have considerable opportunities of assisting the plaintiff, if he were employed by him as his agent, in the purchase of foreign stock; that the plaintiff placed the utmost confidence in Mr Rothschild, and employed him as his agent in the transactions mentioned in the bill, and that Mr Rothschild accepted the office of the plaintiff's agent, and charged him a commission upon all his transactions for him. The bill then stated the transactions before detailed, but attributed the plaintiff's having engaged in every one of them, whether it was a purchase or sale, to advice alleged to have been given to him

by Mr Rothschild, and to the confidence which he reposed in Mr Rothschild. The bill then alleged that the plaintiff had lately discovered that Mr Rothschild, throughout, gave him false advice with a view to his own profit. With respect to the sale of the 20,000 rentes, the bill stated that the plaintiff was induced, by Rothschild's letter of the 25th May 1818, to suppose that those rentes had been sold to some third person, in open market; but that he had lately discovered that they were purchased by Rothschild himself, and that, soon after the sale, the price of rentes rose, as Rothschild had foreseen would be the case. The bill insisted that this transaction was fraudulent and void, Rothschild having purchased the rentes without the plaintiff's knowledge, while he was employed by the plaintiff as his agent or broker, for the sale thereof, and that, if Rothschild had intimated that he himself was to be the purchaser of those rentes, the plaintiff would have suspected that he was interested in the advice that he gave to the plaintiff, to sell them, and would not have acted on his advice. It was not, however, alleged that the plaintiff received less than the fair market price of the day for his rentes.

With respect to the 5,000*l.*, 5,000*l.* and 40,000*l.* Prussian bonds, it was alleged that the plaintiff purchased them, by the recommendation of Mr Rothschild, and that specific bonds to the amount of 50,000*l.* ought to have been set apart for the plaintiff, as his specific property, and kept by Mr Rothschild distinct from his other bonds, and to be in no way parted with without the plaintiff's consent; but that no bonds were set apart, and that, for want of such an appropriation, the purchase of those bonds in June 1818, and the sale of them in December 1818, were false and fraudulent, and ought to be considered null and void. With respect to the purchase, by the plaintiff, of the 115,000 rentes in December 1818, and January and February 1819, the sale of 110,000 of those rentes in May following, the purchase of 105,500 rentes on the 11th of June 1819, and the sale of those rentes in September following, the bill alleged that those purchases and sales also were made, by Mr Rothschild's advice, but that no such sales or purchases ever actually took place, but that the same were nominal and fictitious, and that, therefore, those transactions were to be considered fraudulent as against the plaintiff. The bill further charged that, when the plaintiff settled the account in December 1819, upon which he paid the balance of 1,614*l.* 19*s.* 2*d.* he was ignorant of the several circumstances in the bill alleged, and that he had since discovered that there were various errors and improper charges in that account.

The bill prayed that the purchase, by Mr Rothschild, of the 20,000 rentes might be declared fraudulent and void, and that he might be ordered to transfer rentes to that amount, into the name of the plaintiff, or to pay to the plaintiff their then value, and also the dividends which had accrued since the purchase of the rentes, the plaintiff offering to repay the purchase-money, with interest at 5 per cent. from the time of the purchase, and that the accounts between the plaintiff and N. M. Rothschild might be opened, and that an account might be taken of all the dealings and transactions between the plaintiff and N. M. Rothschild and his Brothers; and that, in taking that account, N. M. Rothschild might be charged with the difference between the price at which he sold the 50,000*l.* Prussian bonds to the plaintiff, and 37,500*l.*, the

price at which he pretended to buy them back, with interest from the 31st of December 1818. And that N. M. Rothschild might be charged with the actual value or price of the 17,000*l.* Prussian bonds, with interest at 5 per cent. from the time when he actually sold the same; and also with the value, to be then sold, of 110,000 French 5 per cent. rentes, and with the dividends thereon, from the time when the same were represented by N. M. Rothschild to have been purchased by the plaintiff, the plaintiff offering to be charged with the purchase-money agreed to be given for the same, with interest at 5 per cent.; or, at least, that Rothschild might be charged with the 1,614*l.* 19*s.* 2*d.* paid to him by the plaintiff on the 10th of December 1819, with interest from that day at 5 per cent. per annum; and that the sums improperly charged to the plaintiff for interest, and expenses of the express might be disallowed.

The defendant, N. M. Rothschild, by his answer, denied that he ever carried on the business of an agent or broker for the sale of foreign stocks or securities; but he admitted that, at the time mentioned in the bill, he was in the habit of contracting for government loans, and dealing very extensively in foreign securities. He denied that the plaintiff employed him as his agent, in procuring the dividends of the 20,000 rentes to be received in Paris and remitted to England; but said that the plaintiff employed Rothschild, Brothers, as his agents, and that the defendant acted as their agent in that transaction. He denied all the allegations tending to charge him with having sought the confidence of the plaintiff. He also denied that he ever acted, or consented to act as agent for the plaintiff in the sale or purchase of foreign stocks, or ever charged the plaintiff with commission thereon; but that the house of Rothschild, Brothers, were the plaintiff's agents in those transactions, and charged the plaintiff with the usual mercantile commission on his transactions abroad. With respect to the advice which he was alleged to have given to the plaintiff, he said that he and his clerks were daily consulted by numbers of persons at his counting-house, and upon 'change, as to the foreign funds, and it was therefore utterly impossible for him to recollect what advice he might have given upon these subjects, so long ago, either to the plaintiff, or any other individual; but that, whatever advice he might have given to the plaintiff, or to his broker on his behalf, it was always given *bonâ fide*, and that the only advice he recollected to have given to the plaintiff was in May 1819, to sell his 110,000 rentes in Paris rather than in London, and to send an express for that purpose: That, at the time he received the plaintiff's letter of the 24th of May 1818, which contained positive orders to sell the 20,000 rentes, it appeared to him to be immaterial to the interest of the plaintiff, whether the stock was sold to the defendant and his partners, or to any other person, and that he therefore purchased the said stock on behalf of himself and his partners, at the price of 69 francs per cent. at the exchange of 23 francs and 90 centimes for every pound sterling, which produced the sum of 11,548*l.* 2*s.* 4*d.* exclusive of 180*l.* 6*s.* 8*d.* the interest due thereon: That, on the same day he made another purchase of rentes through the same brokers, to the extent of 36,000 rentes, and gave for the same 68¼ francs per cent., and at the same rate of exchange: That, in consequence of the instructions contained in the

said letter, he, on the same day, invested the proceeds of the sale of the rentes in the purchase of Prussian bonds, to the amount of 14,000*l.*, belonging to him, at 82½ per cent.; that 82½ per cent. was a fair price, for that he sold bonds on the 23d of May at 83 per cent.: That the sale of the bonds was not a nominal sale, he having in his possession at that time, and at all times until the delivery thereof to the plaintiff, Prussian bonds to an amount far exceeding 14,000*l.*, of which he considered himself as holding bonds to that amount for the plaintiff, though the particular bonds were not selected for the plaintiff until the delivery thereof: That although the bonds were furnished by the defendant out of his own stock, yet they were furnished at the price of the day, and, if the defendant had purchased the same in the market, it would have had the effect of raising the price, which the plaintiff would have had to pay: That, although those bonds were furnished by the defendant, it was necessary for the regularity of the sale, as a mercantile transaction, that a broker should be employed, and Messrs. Dearman & Co. were employed accordingly, and received the commission of one quarter per cent., and made out the regular sale note: That, in selling the 20,000 rentes, he acted by the orders of the plaintiff, and gave for the same the full and fair market price of the day, and if he had sold those rentes to one or more individuals, and had purchased, on his own account, on the same day, from other individuals, the same amount of rentes, the price of the said stock would not have been raised or lowered thereby; but if he had sold the rentes, and had not bought himself on the same day, the market price of rentes would have been lowered; so that the plaintiff might have been a gainer, but could not have been a loser, by the defendant purchasing the rentes for himself and his partners.

With respect to the letter of the 25th of May 1818, the defendant said that it was his habit to inform his clerks of the different transactions which he had effected in the course of the morning, of which, advices were to be forwarded by that day's post, and to leave it to such clerks to put such information into the form of a letter, to be signed by himself; and that he was in the habit of signing such letters after a very cursory perusal thereof, and sometimes without perusing the same: That, on the day on which he effected the aforesaid sale and purchase on account of the plaintiff, he did, as he believed, inform one of his clerks thereof, and desire him to write to the plaintiff and acquaint him with what had been done: That the clerk accordingly wrote a letter, which the defendant signed: That he had no intention to conceal from the plaintiff the real facts of the purchase and sale: That the plaintiff was so satisfied that the defendant had done the best he could for him, that, in answer to that letter, the plaintiff wrote to him on the next day, as follows: "I beg to return you my best thanks for getting the transaction in the French funds and Prussian bonds, effected so much to my advantage." That the 20,000 rentes were worth the sum that they produced; that, since that time, the French funds had fluctuated and they had sometimes been worth less than that sum; but that, inasmuch as in the whole, a considerable rise had taken place in such stocks, the same would then produce 15,748*l.* or thereabouts: That, in all sales of French stock, it was necessary for the seller to give over the certificates, denoting the inscription to have

[Brookman *v.* Rothschild.]

been made in his name, with a power of attorney, to the purchaser, to have the rentes transferred into his name: that he was ignorant whether any profit had been made by him by the sale of the rentes so purchased of the plaintiff; for he and his partners had, at the time of the purchase, a very large sum of rentes standing in their names, to which the 20,000 rentes were added; that they had since been continually buying and selling French stock, sometimes at higher and sometimes at lower prices than the price at which the plaintiff's stock was purchased, and that it was impossible to state when the plaintiff's stock was sold; but that the defendant, on the 27th of May, 1818, sold 5,000 rentes, at 69 per cent., at the exchange of 23 francs and 90 centimes, (upon which he allowed ¼ per cent. brokerage); and, on the 29th of the same month, 15,000 rentes, at 69 per cent., at the exchange of 23.80, allowing the same brokerage: That Prussian bonds fell, after the sale to the plaintiff, but that they had since borne a much higher price.

With respect to the second series of transactions, commencing in June 1818, he denied that it was ever understood, or agreed between him and the plaintiff, that the 50,000*l.* Prussian bonds should be held, by the defendant, separate and distinct from his own property, as the specific property of the plaintiff, and to be in no way disposed of without the plaintiff's order: That the defendant, when the 17,000*l.* bonds were deposited with him, told the plaintiff that he might have occasion to deliver out Prussian bonds to other persons, and that as he wished to avoid signing more than was necessary, he should, in case of need, use those bonds; and that the plaintiff gave his full consent to his doing so, it being understood that the defendant would give the plaintiff other bonds of equal amount, when required: That the plaintiff engaged in the transaction as a mere matter of speculation, and was perfectly indifferent whether the bonds were marked as his property, or whether he had the defendant's liability to answer the amount whenever called upon: That the price at which he purchased the 67,000*l.* bonds, in December 1818, was the fair price at the time; and that between the 18th and 29th of that month, he sold 47,100*l.* Prussian bonds, at 75 per cent., allowing ⅛ brokerage thereon.

With respect to the last series of transactions, he said that the 115,000 French rentes were sold by him and his partners, to the plaintiff, at the prices of the days on which they were purchased; but that those rentes were not transferred into the plaintiff's name, but remained to be so transferred whenever paid for, and that he, the defendant, had at all times the amount ready to transfer; and that the plaintiff knew perfectly well that no transfer had been made, but that the rentes remained as a security, to him the defendant, until paid for. He said that the sale in May 1819, the purchase of 105,500 rentes in June, and the re-sale of those rentes in September following, were all conducted by Messrs Rothschild, of Paris, acting as the agents, and by the orders of the plaintiff and his brokers, Messrs Dearman, Bell & Harford: That, to the plaintiff and his brokers, the usual accounts were rendered, and that he, N. M. Rothschild, had no means of knowing anything of the particulars of those transactions, except from some letters, and copies of letters, lately transmitted to him by Messrs Rothschild, of Paris. He said, however, that so far as he was concerned, those transactions were perfectly regular and fair, and he had no doubt

but they were the same, so far as Messrs Rothschild, of Paris, were concerned. He added that he believed that the plaintiff, at the time he paid the balance of 1,614*l.* 19*s.* 2*d.*, knew all the facts he pretended to have since discovered; and he insisted upon the account settled in December 1819, as a settled account.

The other defendants being out of the jurisdiction of the court, did not answer the bill.

The Solicitor-General and Mr Spence, for the plaintiff:

The correspondence that took place between the parties, and particularly the plaintiff's letter to the defendant of the 24th of May 1818, show that the defendant stood in the situation of confidential agent to the plaintiff. The sale of the 20,000 rentes and the purchase of the 14,000*l.* bonds were both fictitious transactions. The defendant never sold the rentes, but took them to himself: nor did he ever buy the bonds, but furnished them out of his own stock: and there was no appropriation of any bonds in his possession, till they were actually delivered to the plaintiff, in the month of October 1818. The transaction was one which, in this court, is called fraudulent; there having been a pretended sale, and a pretended purchase. No dealings took place with a third person, as was intended by the plaintiff. It was material, to the defendant, that there should be an appearance of reality given to the transaction; and accordingly, he employed the brokers, Dearman, Bell & Co., not to buy or sell, but to make out bought and sold notes, as on a real transaction; and the plaintiff was charged with commission. The defendant, in his answer, states that the furnishing of the bonds out of his own stock, was more beneficial to the plaintiff, than purchasing them in open market: but, if an agent is employed to purchase any article in open market, he is not justified in procuring it in any other manner. If the defendant was doing what was right, why did he not disclose the real nature of the transaction, to the plaintiff. The defendant, by keeping the bonds in his possession, unappropriated, was enabled to affect the market as he pleased. Suppose that he had made twenty sales like that to the plaintiff, and he wanted to become a purchaser, his object would then be to depress the price of bonds; and, to effect it, he would have nothing to do but to carry into the market a number of the bonds belonging to the parties standing in a similar situation to Mr Brookman, and offer them for sale. The consequence would be that the market price would be lowered: and he would then be able to purchase the bonds, of these parties, at that reduced price which would be the current price of the day, without having removed them from the place in which they were kept. The authority given to him was to sell rentes to a third person only, and to purchase the bonds from a third person only. Instead of doing so, he sold to himself, and bought from himself, privately, and held out, to the plaintiff, that he had sold to others, and bought from others. It will be said that as the plaintiff got the fair price of the day, it was immaterial to him whether the rentes were sold to the defendant or to a third person: but, as the defendant became the agent and broker of the plaintiff, he was bound to act as such: and the plaintiff had a right to the benefit of his experience, and of the information he was constantly receiving from all quarters of

Europe: and, if he saw that rentes were rising or were likely to rise, the plaintiff has a right to complain that he did not delay the sale, until a better price could be obtained. The defendant had better information than any other person in the kingdom; and he used it, not for the plaintiff's advantage, but for his own. If the rentes had been sold in the market, that would have been the best assurance that the plaintiff could have had, that the defendant was acting for his interest, according to the knowledge he possessed: but, as he privately bought them for himself, and did not disclose to the plaintiff that he had done so, but endeavoured to give to the transaction the appearance of a real one, the plaintiff is justified in concluding that he made use of some information that he possessed, for his own private advantage. This is a case between principal and agent. It is not material to inquire at what price the rentes were sold. The question is whether the confidence that was reposed, has been abused. If the defendant, when he advised the plaintiff to sell his French stock and buy Prussian bonds, had told him that it was not the course that he himself was pursuing, and that, if the plaintiff did so, he should buy the stock and sell the bonds, can it be believed that the plaintiff would have followed the advice? It would immediately have occurred to him that it could not be for his advantage to take a course directly the reverse of that which the defendant, with his extensive information, was following. The defendant, however, pursued a course which was directly the reverse of that which he recommended to the plaintiff, his principal, and that too at the expense of his principal. It is useless to say that the plaintiff got the price of the day for his rentes, or that he paid no more for the bonds that he bought, than other persons did. The question is whether the agent of the plaintiff did not deceive the plaintiff, for his own benefit. We have shown that the defendant filled the character of agent to the plaintiff; that he took upon himself the performance of the duties of that situation; that the plaintiff reposed confidence in him; that the defendant represented that the sale of the rentes and the purchase of the bonds, were real transactions with a third person; that he took a line of conduct directly opposed to that which he recommended to the plaintiff, and that the whole transaction was for his own benefit. In the course of three months French stock rose 10 per cent., and Prussian bonds, in the course of six months, fell 7 per cent. It may be taken for granted that the defendant, when he purchased for himself French stock, and disposed of his Prussian bonds, anticipated a rise in the former and a fall in the latter, although he represented to the plaintiff that the reverse was likely to happen. As early as the 13th of June 1818, when the French rentes were rising, the plaintiff, writing to Mr Rothschild, says: "I was very unfortunate in selling my French stock so soon." One would have thought that Mr Rothschild, a man of immense wealth and capital, who had secretly taken to himself the French stock without communicating the fact to the defendant, upon reading this passage, would have said, "I have got French stock and will let you have the same quantity of that stock at the old price." But instead of that, he writes him a letter, two days afterwards, in which there is this passage, "I observe what you mention respecting the sale of your French stock; but you must allow in transactions of this kind it is impossible always to be on the right side."

Then he speaks favourably of Prussian bonds, which he thinks will very soon be at 90; so that, while he condoles with the plaintiff on the sale of French stock, which had never been sold at all, he attempts to buoy him up with the hope that Prussian bonds will soon be at 90. These expressions in this letter, coupled with what took place before, make out a clear case of misrepresentation. Every expression points to an intention on the part of Mr Rothschild, to impress the plaintiff with a belief that it was a *bonâ fide* sale to some third person; that the stock was gone and could not be recovered: but he still held out a hope that something might be got by Prussian bonds. This is the end of that singular transaction; and as the defendant was the plaintiff's agent, and had no authority to sell for him except to a third person, and as the defendant privately bought and sold for himself, under the colour of a real transaction, the court will not permit him to derive the slightest benefit from his dealings, Oliver *v.* Court, 8 Price, 127.

In consequence of the defendant's representation as to Prussian bonds, in his letter of the 15th of June, the plaintiff became anxious to buy some of those bonds, in order to repair the loss he had experienced in the former sale: and accordingly he bought, from Mr Rothschild himself, (who was a great holder of Prussian bonds, being the contractor for the loan), 50,000*l.* of such bonds in the whole. These bonds were not to be paid for immediately, because, in the first place, the plaintiff had no money at command, and, in the next place, Mr Rothschild himself had not paid all the instalments on the bonds, to the Prussian government: and it was agreed that the plaintiff should pay interest on the instalments, and that, on a subsequent day, he should pay the purchase-money with interest. On the 6th of October 1818, an account was delivered to the brokers, which made due from the plaintiff to Mr Rothschild, for the bonds in question, 41,522*l.* 4*s.* 10*d.* The plaintiff gave his promissory note for 41,500*l.*, and the odd money was paid in cash; and the plaintiff authorised Mr Rothschild to retain the bonds as a collateral security for the money secured by the promissory note. The plaintiff has proved that the purchase of these bonds was a real transaction, so far as he was concerned, and that he considered that he had bought 50,000*l.* worth of bonds, in specie, and that they were to remain with Mr Rothschild as his security only, not as his bonds forming part of his stock, but as the plaintiff's bonds, specifically appropriated to him. The letter of the 13th of June proves that such was the agreement; because the plaintiff, in that letter says that Mr Rothschild was to hold those bonds for his security.

Mr. Bell proves, in the most distinct terms, that the bonds were to be the plaintiff's specific property, and were not to be used, in any manner, by Mr Rothschild.

The plaintiff, in the result, paid the whole of the purchase-money, with interest, and also brokerage and commission. It seems singular that the plaintiff should be required to go into evidence to show that he was to have for his money, that which he had actually purchased. Yet the defendant says that there was no necessity at all for him to give the plaintiff these bonds, that he had a great number of them in his possession, and that the plaintiff might have had them delivered to him when he paid for them. He admits, in his answer, that he never appropriated a single bond to the plaintiff in respect of the 50,000*l.* bonds which he

had so purchased. The consequence was, that there were no bonds which belonged to the plaintiff, more than to any other person: therefore it was a contract on one side only. If the defendant had become bankrupt, would not these bonds have been in his order and disposition? By keeping unappropriated the great mass of bonds which the defendant held, he might have sold these bonds twenty times over, and purchased them back again, and, when called upon, have delivered to the plaintiff what he represented to be his bonds. But that was not the contract between the parties. The plaintiff bought what the defendant was to appropriate. And how can it be represented that the defendant had performed his part of the contract when (although he was charging the plaintiff with interest) he had never appropriated a single bond. That, of itself, is a sufficient ground for the court to relieve against this transaction; for there never was a completion of the purchase so made by the plaintiff, the defendant never having divided, from his stock, or appropriated, or carried to the plaintiff's account, those bonds which he affected to sell to the plaintiff.

Besides these 50,000*l.* bonds, the plaintiff possessed 17,000*l.* of other Prussian bonds, with which, at that moment, Mr Rothschild had no connexion; they were in the plaintiff's hands. On the 18th of September, 1818, the plaintiff borrowed of the defendant 8,500*l.*; and, on the 15th of October in the same year, he borrowed of him 4,200*l.*; and those two loans, which were distinct transactions, amounted to 12,700*l.* On the first loan the plaintiff made an actual deposite of 11,000*l.* of his 17,000*l.* of bonds; and, on the second loan, he made a further deposite of those bonds to the amount of 6,000*l.* In order to prove that the plaintiff was considered still, as of course he was in law, the owner, as well of the 50,000*l.* bonds, as of those which he so actually deposited, it is in evidence that, when the 11,000*l.* bonds had been deposited, and before the 6000*l.* bonds were deposited, the defendant accounted to the plaintiff for dividends on 61,000*l.* of bonds, being the dividends on the 50,000*l.* bonds never appropriated, and on the 11,000*l.* bonds which were actually deposited; so that the whole 61,000*l.* of bonds were considered as the plaintiff's own bonds.

Although there is the clear and decisive evidence of the broker to prove that the 11,000*l.* and 6,000*l.* bonds were deposited as a collateral security only, Mr Rothschild says, in his answer, that it was understood that he was to have the use of those bonds. So that, although he held the plaintiff's promissory notes, carrying interest, and had his bonds deposited with him, as a security for the money due to him, he asserts that he was to have the benefit of dealing with the bonds which were so deposited, just as he thought fit; and the fact is, that he sold 11,000*l.* of the bonds, at a considerable profit, shortly before the plaintiff sold them himself; and, when they fell to 75, he recommended the plaintiff to sell them, and he sold them at 75, the defendant having already sold them at a considerable profit, which he put into his pocket and carefully concealed from the plaintiff. It was an object with the defendant not to touch, without actual necessity, the mass of bonds which he had in his hands. For there was a great point to be carried in not delivering out more bonds than had already got into the market. These 11,000*l.* of Prussian bonds had been already in the market; and were known to have been so, by the brokers; so that no alarm was

created by their appearing there again. But if Mr Rothschild, who was the contractor for the loan, had brought into the market bonds which had not before appeared there, they would have instantly fallen in value. So that he not only put into his pocket that which did not belong to him, but kept up the price of the vast mass of Prussian bonds which he had in his possession.

Prussian bonds having fallen to 75, Mr Rothschild recommends the plaintiff to sell, and says he hopes that, by that sale, the plaintiff would repair his losses. Now he had it in his own power, without any great sacrifice of his own interest, to repair the plaintiff's losses, by paying to the plaintiff the money which he had got by the sale of these bonds, which, when they were sold, were the plaintiff's bonds. This he was bound to do; for he was the agent of the plaintiff, and had sold the plaintiff's bonds at a profit, and had got the money in his pocket. The defendant having advised the plaintiff to sell his 67,000*l.* bonds, a sale was made to the defendant; and the plaintiff was a loser to the amount of 4,000*l.* and upwards: and it is a singular circumstance that they had not been sold a single month before they rose 3¾ per cent. This fluctuation may be easily accounted for, by the command which the defendant had of the markets, not merely by his capital, his resources and his knowledge, but by his having it in his power to pour Prussian bonds into the market as he pleased, or to withhold them as he pleased. The plaintiff had then left 5,500*l.* of other bonds, and deposited them as a security for the 4,200*l.* That sum was ultimately paid. This concluded the second transaction.

By Mr Rothschild's recommendation the plaintiff begins the third series of dealings, which commenced with the purchase of 115,000 French rentes from Mr Rothschild. The stipulation was that the purchase-money, with interest, was to be paid on or before the 15th of June, and, in the mean time, the stock was to remain in the name of the defendant. This was not a time bargain, but a real and *bonâ fide* purchase of stock represented to be in the name of the defendant. The dividends on this stock were accounted for by the defendant to the plaintiff, and the plaintiff was charged with commission and agency precisely as upon a real transaction; and the house of Rothschild, Brothers, in speaking of the transaction, called the stock the plaintiff's rentes. As always happened, the moment the plaintiff bought, the rentes fell. He was then recommended to sell; and it was thought so important that not an hour should be lost in the sale, that an express was recommended, by the defendant, to be sent to Paris, with an order to the house of Rothschild, Brothers, to sell the French stock instantly. An express was accordingly sent, and the plaintiff paid 37*l.* for the expenses of it. On the 28th of May, Rothschild, Brothers, sold the stock, and they charged commission and brokerage, as on a real transaction. The money was not remitted to England for want of bills. The letter of the 29th of May 1819, from Rothschild, Brothers, to Mr Bell the broker, stated the sales to have been made in sums of 10,000, 20,000 and 30,000 francs, all fetching different prices; and they added: "We can assure you that our very best exertions have been used in the sale of this stock." It must have been very consolatory to the plaintiff, considering the great estimation that this house was held in, and the means they had of effecting an advantageous sale for him, that they had used

their best exertions in the sale of his stock, and he was led to believe that the stock had fetched the utmost price that could be obtained for it. However, the plaintiff's usual ill luck attended him; for French rentes rose the moment he had sold them. The result of which was, that he was induced to direct, as the money had never come home, that it should be re-invested in French stock; and by that transaction he lost, in annual revenue, 4,500 francs. The re-investment was effected by Rothschild, Brothers, as the partners and agent of the defendant. In their letter they heartily wished the plaintiff success in these renewed operations, and that the event would fully justify the agreements he had made, and they stated the different prices at which the re-investment had been made. It is remarkable, that, in the sale, the highest prices were affixed to the smallest sums, and in the purchase, to the largest sums. The plaintiff, wanting to dispose of his second purchase, applied to the defendant to let him re-sell in London; but the defendant refused to do so, and advised the plaintiff to sell in Paris; and, in consequence of this recommendation the plaintiff went over with his broker to Paris, for the purpose of giving directions to Rothschild, Brothers, to sell his stock. He had, previously, sold 5,000 francs of that stock here, under the impression that he was actually the holder of it; and the defendant undertook to transfer those 5,000 francs to the person to whom the plaintiff had sold them, and he was to receive the money in part payment of what was owing to him. On the 22d of September 1819, Rothschild, Brothers, sold the remainder of the plaintiff's stock, under his direction, and commission and brokerage were charged on this sale. Messrs Rothschild, Brothers, said that they would remit the proceeds of the sale in bills at 30 days' sight, by which the plaintiff lost a certain amount of interest. On the plaintiff's return to England, an account was made out of the whole transaction as to the 115,000 rentes; and the result was that a balance was found against him of 1,614*l.* which he paid. So far as the plaintiff was concerned, these were all real, *boná fide* transactions; but, on the part of the Rothschilds, there was no reality in any part of them. There was no stock in Messrs Rothschilds' names to answer these 115,000 francs; there was no sale; there was no re-purchase and there was no re-sale by them. In what situation would the plaintiff have been, if a revolution had taken place in France, and he had gone, under a convention, to claim stock as his? Where would have been the proof of his claim? It is particularly necessary to draw the attention of the court to the letters which were written by Mr Rothschild and his Brothers, while they were carrying on these transactions. Nothing could be more extraordinary than the delusion which was kept up as between themselves. The letter from Mr Rothschild to his brothers, of the 26th of May 1819, was written as on a real transaction. This letter might have been seen; therefore it was written as a common business letter, and Mr Rothschild told his brothers the prices which he had charged for the rentes, for fear they should not know them. Then there is a letter of the 29th of May 1819, from Rothschild, Brothers, to Messrs Dearman & Co., in which they say that their best exertions had been used, and they state the prices at which they had sold the stock. This letter was well calculated to make the plaintiff believe that their very best exertions had been used in the sale of the stock, and that they had got the

highest price, and had been dealing, at arm's length, with the several purchasers with whom they had contracted for the sale of the property. The best exertions which had been used, turn out to be, taking this stock to themselves at such price as they thought fit to give for it, and then charging commission, brokerage, exchange, &c. as if it had been a real transaction. This, therefore, is a case which, in this court at all events, is called fraud. They pretended to sell to the plaintiff what they had not, and to re-sell for him that which they never re-sold at all: and they made the plaintiff, whose agents they were, believe that they were using their best exertions for his benefit, whereas they were using no exertions at all except for their own advantage. The stock never existed; for, although they had a small sum of stock in their names, they had not enough to answer the different transactions. The letter of the defendant to his brothers, of the 8th of June 1819, and the letters from them of the 12th and 26th of the same month to the plaintiff and his brokers, were written for the same delusive purposes. There are some letters which seem to have been written with a different intention. The first of these was from the defendant to Rothschild, Brothers, dated the 15th of September, in these words: "Mr Brookman and Mr Bell the broker, intend to visit you respecting Mr Brookman's French stock; I will write to you fully respecting this business in my next." Now the next post was the 17th, but no such letter is found; but we find an answer which shows that a letter was actually sent, for it contains these words: "Due attention will be paid to your cautions respecting Mr Bell and Mr Brookman," from which it may be fairly inferred that the defendant had written to his brothers, instructing them to take care that nothing should transpire to let the parties know what the real nature of the transaction was. They did take care, and the fact was never found out till a late period.

The defendant has gone into evidence to shew that the plaintiff had stock transactions with other persons. But that has nothing to do with these transactions. If a person were to file a bill, to be relieved from the purchase of an estate on account of a fraud practised upon him, by the vendor, it would be absurd for the vendor to go into evidence to prove that the purchaser had bought estates of other persons, as to which no fraud had been practised upon him.

The relief which the plaintiff is entitled to, with respect to the first transaction, is to be reinstated in his original position. With respect to the purchase of the 50,000*l.* bonds, he is entitled to be relieved from it altogether; and as to the 17,000*l.* bonds, he ought to be paid the difference between the price at which they were sold by the defendant, and the sum for which the defendant gave the plaintiff credit in respect of them. As to the 115,000 rentes, the plaintiff is entitled to have rentes to that amount transferred to him, upon paying the price at which he agreed to purchase them.

Mr Pemberton and Mr Knight, for the defendant, N. M. Rothschild.

The bill proceeds on two totally distinct grounds. The principal ground of relief is, that the defendant, Mr Rothschild, undertook to act as the general agent of the plaintiff, in the management of his stock transactions; that he obtained his confidence, and abused it; and having, by that means,

thrown a heavy loss on the plaintiff, and secured a large profit to himself, he is, in respect of that abuse of confidence, liable, in a court of equity, to make good all the loss that his principal has sustained. But not a particle of evidence has been produced to sustain that main allegation of the bill. On the contrary, every document which has been produced to show the origin of the connection between the plaintiff and the defendant, totally disproves that allegation. The first document which the plaintiff gave in evidence was the letter of the 6th of April 1818, by which Rothschild, Brothers, advise the plaintiff that they have received his dividends; that they have charged him with commission on them, and remitted the amount to the defendant. If this fact had been correctly stated in the bill, there would not have appeared even the semblance of an agency in the transactions between the plaintiff and the defendant. With respect to the defendant voluntarily undertaking the agency, tendering the plaintiff his advice and services, and inducing him to rely on his representations, it appears from the correspondence between them, which the plaintiff puts in as his evidence, that the plaintiff applied to the defendant, in the first instance, to be allowed to subscribe to the Prussian loan, and was anxious to subscribe for twice the amount that the defendant consented to. Is it possible more grossly to misrepresent the effect of transactions than to give that colour to them which the plaintiff has attempted to give to this? He says that the defendant persuaded him to embark in it, having undertaken to act as his confidential adviser, and to regulate his proceedings in speculations of this nature. It appears, however, that the defendant had undertaken no such character; that he made no such representation; that he had no communication whatever with the plaintiff, except at the plaintiff's own request, and gave no opinion except that which the plaintiff himself asked for. Before there is the slightest semblance of evidence to fix the character of agent for the plaintiff, on the defendant, Messrs Dearman & Co. are proved to have been the brokers and agents of the plaintiff. Instalments were to be paid upon the Prussian loan, a short period after the subscriptions were handed in; and the plaintiff, (who is proved to have been jobbing in every speculation which, at that moment was afloat in the city of London, till he utterly ruined himself), was, at the time, employing men of knowledge, as his brokers and agents, not as brokers only, but as agents, because, in the character of agents alone, could they have anything to do with paying, to the defendant, the instalments on the loan. Throughout the correspondence that took place between the parties, at this period, we find no advice tendered to the plaintiff by the defendant, but merely applications by a person desirous of making purchases in foreign securities, to a dealer in those securities, for the opinion of the latter as to circumstances which were likely to effect their rise, or fall. The plaintiff afterwards wrote to the defendant, requesting that, if the latter should become a party in taking the French loan then about to be negociated, he would permit the plaintiff to become a subscriber for a portion of it, and inquiring the prices of French 5 per cents. and the Prussian loan. In answer to this letter, the defendant, after telling the plaintiff that he can not let him have any part in the French loan, communicates to him the prices of French stock and Prussian bonds, and adds, "I think you would do well to sell part of the former and invest it in the latter."

Is the defendant to be charged with an intended misrepresentation, with abusing the character of agent, because, not having, up to this time, the slightest semblance of the character of agent, when he is desired to tell the plaintiff what are the prices of different securities, he tells him what premium the Prussian loan bears, and what are the prices of French rentes. The plaintiff must have known what was the contract price of the Prussian loan, because he was a subscriber to it; and then the whole charge of misrepresentation is founded on the circumstances that the defendant, having no sort of confidential character to sustain towards the plaintiff, having given him accurately every information that he asked, adds that he thinks the plaintiff will do well to sell part of his French rentes and invest it in Prussian bonds. The transaction of the 20,000 French rentes, begins with the answer to this letter. Up to this time not only is there no proof of any agency undertaken on the part of the defendant, but the contrary is distinctly proved by those very documents which the plaintiff himself has produced. The truth is that the plaintiff was a speculator who desired to acquire a benefit, from the information and knowledge of the defendant, and that the defendant gave him such information as is not even pretended to have been incorrect.

The ground on which the plaintiff complains of the transaction as to the 20,000 rentes, is that the defendant was the agent for the sale of them; and that he could not sell them except to a third person. It can not be denied that, by the letter of the 24th May 1818, Mr Rothschild became to a certain extent, the agent of the plaintiff. But the agency was the most ministerial that could be conceived, for Mr Rothschild had no discretion to exercise. He was directed to sell the rentes immediately on the receipt of the letter. He was bound, of course, to obtain the best price; and it is proved that he did obtain it; for, on the same day, he bought, from other persons, through the medium of brokers, 36,000 rentes, at a lower price than that which he paid to the plaintiff, and at the same rate of exchange. There is not the slightest suggestion, in the evidence, that the price which the defendant gave, was not the very utmost price that could have been obtained on that day. Is then Mr Rothschild, although he had received a letter, leaving him no discretion to exercise, but positively directing him to effect the sale immediately, and although the plaintiff has not sustained any damage, but has derived a profit from the exercise of his agency, on a technical principle of a court of equity, totally inapplicable to transactions of this character, to be called upon, 10 years afterwards, and when French stock has risen 10 or 20 per cent., not to make good the damage, because none was sustained, but to give back 20,000 rentes at their present price? If such a principle is to prevail, the consequences will be most mischievous; for no banking-house in London will be able to carry on business. Bankers constantly receive directions, from their customers, to make sales of stock; and if this principle is to prevail, every banker who has taken a transfer, of stock, from the name of his customer into his own, will be called on to make good the present value of the stock.

The doctrine founded on the relation of trustee and *cestui que* trust, and principal and agent, has never been applied to any species of property which is not also a subject of specific performance; and, there-

fore, it is inapplicable in the present case. The relief which courts of equity give in cases to which that doctrine does apply, is, if the specific article still continues in the ownership of the trustee or agent who has purchased it, to compel him to return it to the vendor, who must make the trustee or agent an allowance for the money he has expended in improving the property; or, if the property has been sold again, then to compel the trustee or agent to account for the profit on the re-sale. But the plaintiff asks, not that the defendant may restore the specific 20,000 rentes, but that he may purchase, for the plaintiff, 20,000 other rentes, at the present price, or pay him the value of them. So that, if this equity is to prevail, an agent for the sale of an estate, who has purchased it himself, and then re-sold it, may have a decree made against him, not to refund the profit he has made by the re-sale, but to re-purchase another estate of equal value. Such an equity was never heard of. But supposing that the plaintiff was to claim the profit made by the defendant upon this transaction, it has been proved that the defendant gave the plaintiff more than the price of the day, more than he gave to other persons, and that, within a few days afterwards, he sold that stock, or stock to an equal amount, for the same price that he gave to the plaintiff. What ground then is there for the statement, made in the bill, that the defendant was desirous of increasing his French rentes and diminishing his Prussian bonds, and that he gave the advice to the plaintiff with a fraudulent view, in the character of agent, and that he is to be answerable for the consequences, although he did not derive any benefit from the transaction, and the plaintiff did not sustain any loss? Can it be seriously contended that, ten years afterwards, the plaintiff can come to the court and ask to have the transaction treated as a nullity, and to have the 20,000 rentes, which he ordered, unconditionally, to be sold, to be replaced in his name at the price of the present day? This transaction was an exchange of the 20,000 rentes for 14,000*l.* Prussian bonds: and yet the plaintiff, though he says that the transaction was a nullity, does not propose to return, to the defendant, the Prussian bonds which he gave in exchange for the rentes, and which have risen as well as the rentes, but merely the money which was invested in the purchase of those bonds. It is then said that, although the plaintiff may have sustained no injury in this transaction, it was concealed from him that Mr Rothschild was, at the time, buying French rentes and selling Prussian bonds; and that, if the plaintiff had known that this was Mr Rothschild's course of dealing, he would not have engaged in the transaction. But until after the plaintiff had formed the determination to sell his rentes and purchase bonds, and communicated that determination to the defendant, the agency had never existed. He could not, therefore, be deceived by the defendant's course of dealing, nor had he the slightest right to know what his course of dealing was. He knew that Mr Rothschild was the contractor for the Prussian loan, and that he, therefore, of course had an interest in keeping up the price of that loan: but he also knew that Mr Rothschild was the contractor for the French loan, and therefore that he had an interest in keeping up the price of that loan also. Why then is it to be imputed, to Mr Rothschild, that he had a motive for inducing the plaintiff to convert his French rentes into Prussian bonds, when he was the contractor for the one loan as well as for the other. But supposing he had done so,

as they were dealing, at that period, simply as vendor and purchaser, Mr Rothschild had a right to give any advice he thought proper, and the plaintiff had no more right to complain than if a tradesman had advised him to lay in a large stock of the goods in which that tradesman dealt. But the fact is that, so far was Mr Rothschild from accumulating rentes at the period in question, that, within a few days afterwards, he sold rentes to a greater amount than he is stated to have purchased of the plaintiff. It is remarkable too that every one of the subsequent transactions took place with Mr Rothschild himself, as the plaintiff well knew: and yet he was uniformly a buyer when Mr Rothschild was a seller, and *vice versa*: and consequently the course of the defendant's dealings could, in no degree, influence the plaintiff.

It was said that the defendant represented, to the plaintiff, that he had bought both the rentes and the bonds, of third persons. Now, though it is quite immaterial what representation the defendant made, it is to be remembered that such is the multiplicity of the defendant's transactions, that all that he is able to do, is to give a short note, to his clerks, of the bargains he has made in the course of the day, and that they communicate, to the different parties, what is the effect of those bargains. Besides, the defendant and his brothers are distinct individuals, engaged in different houses, one in Paris and the other in London. In their dealings with each other, they, as other persons who are in partnership together always do, dealt as separate houses, and the balance of profit and loss was settled amongst them at the end of the year. Therefore the defendant or his clerks, when they stated the transaction as one with third persons, treated it as that which it really was, according to the usual course of mercantile dealing, and used the ordinary terms of mercantile correspondence.

The next transaction is that with respect to the 67,000*l.* bonds. The foundation of the plaintiff's claim as to 50,000*l.* of those bonds, is that there was no appropriation of them. There is no evidence that it was any part of the contract between these parties, that there should be an appropriation of those bonds: and it neither was nor could have been a part of that contract. It appears, by the correspondence that took place, between the plaintiff and defendant, relative to this transaction, that the plaintiff engaged in it as a matter of speculation only, and, for that purpose, it was quite immaterial whether any bonds were or were not set apart as the specific property of the plaintiff. The contract was for the delivery of bonds of a given amount, at a given time, with an option on the part of the buyer, to call for any part of them at an earlier period, on paying the purchase-money. The brokers' notes show that the contract was not for any specific bonds. Those notes do not mention how many of the bonds were to be for 100*l.* or how many for 1000*l.* The only thing that could be required was that Mr Rothschild should have, in his possession, bonds of sufficient amount at the time when they were to be delivered to the plaintiff. Could the plaintiff, after he had accepted the bonds and paid the purchase-money, without making any inquiry about appropriation, have brought an action against the defendant, for the amount of the purchase-money, on the ground that there had been no appropriation? No one will contend for such a proposition: and yet that must be held to be good in law, before the plaintiff can succeed in establishing his demand. The

plaintiff has not ventured to suggest in any part of his bill, that he was deceived, that he was told that there was any appropriation.

It appears, by Mr Rothschild's letter of the 12th of June 1818, that the plaintiff was not induced to engage in this speculation by the advice of the defendant; but that he proposed it to the defendant. Nor was there any confidential relation subsisting between the plaintiff, (who dealt through his brokers) and Mr Rothschild. The plaintiff and defendant stood in the situations of buyer and seller merely, and it is immaterial whether Mr Rothschild did or did not derive any profit from the transaction, or whether he did or did not give any advice to the plaintiff respecting it. The court will be surprised to hear that Mr Rothschild, having obtained the 67,000*l.* bonds, which were in a short time to rise to 90, did not keep in his possession his whole store of bonds, and sell them at that price, but that, between the 18th and 29th of December 1818, about which time he purchased the 67,000*l.* bonds of the plaintiff, he sold 47,000*l.* bonds at very nearly the same price as he allowed to the plaintiff for his bonds; and therefore, he could not have had any unfair motive in advising the plaintiff to sell those bonds, or the least desire to purchase them.

The 17,000*l.* bonds, which were deposited as a security for the 8,500*l.* and 4,200*l.* lent by the defendant to the plaintiff, were differently circumstanced from the rest of the bonds. It is sworn, in the answer, that the plaintiff consented that the defendant should use them, if he had occasion to do so, and that the defendant undertook to deliver, to the plaintiff, bonds of the same amount when required. That such was the arrangement, will appear more probable when it is considered that it was more for the plaintiff's advantage that bonds, which had been in the market, should be re-issued, than that new bonds should appear there. It is a mistake, however, to say that Mr Rothschild undertook to account, to the plaintiff, for the value of those bonds in case he sold them. His agreement was to deliver, to the plaintiff, bonds to the same amount, and therefore all that was requisite was, that he should have bonds sufficient for that purpose. The profit which Mr Rothschild made, by the sale of these bonds, did not amount to 84*l.* so that, if this part of the transaction could be impeached, the defendant would have to account for no more than that sum with interest.

We have now come to the last of these transactions, which is the purchase of the 115,000 rentes. Here again there is not the slightest trace of agency on the part of the defendant. Whatever advice, therefore, he gave to the plaintiff, he can not be made answerable for it, unless it can be proved that he gave it fraudulently. It has been said that this was a real transaction on the part of the plaintiff; and it was so on the part of the defendant also. It was a real transaction, evidenced by the brokers' notes, and of exactly the same character as the prior contract for the purchase of Prussian bonds, by which the article was to be delivered on the payment of the price. It has been said that these rentes were to be appropriated and set apart for the plaintiff. But where is it proved that there was to be any appropriation of these rentes. Has it been shown that there was any undertaking, on the part of the defendant, to retain, in his name, the amount of rentes, which was to be transferred, to the plaintiff, when called for? The brokers' notes contain no evidence of such an undertaking. The

contract was for a certain amount of stock, to be transferred at a given time. It was a loan of the purchase-money for six months, with the option on the part of the plaintiff, to call for any portion of these rentes at an earlier period, on payment of the purchase-money. There was not to be, nor could there be any appropriation; because there was no particular stock referred to. The evidence of Mr Bell the broker, does not afford the slightest ground for inferring that there was any engagement for appropriation, or any undertaking, by the defendant, to retain, rentes of the specified amount, in his name, for the plaintiff. The plaintiff has not proved that there is any mode by which an individual can appropriate, in the books of the French government, any particular portion of stock for any other person. It can not be done in England. One individual can have but one account: and there are no means of making an appropriation in the books of the bank of England, except by uniting the name of some other person with one's own. If this important term of the contract was one of the terms for which Mr Bell stipulated, how was it that he so far forgot his duty to his employer, as never to put down in writing one single syllable relating to it? Mr Rothschild, in his answer, states that his engagement was to deliver stock, at a given price, when called for, and that he always had stock of an amount sufficient to answer the demand. The plaintiff says that the defendant for the purpose of procuring an advantage to himself, persuaded him to sell his rentes. Now there was nothing like agency between them; and the defendant might have given any advice he thought proper. But it was not a matter of advice or option, it was not a matter in which the plaintiff was to be influenced by the persuasion or recommendation of the defendant: for the plaintiff had purchased the property on credit, and the time of payment had nearly arrived, and payment could not be made except by the sale of the rentes. Then it is said that there were no such sales of the rentes as are pretended to have been made; and that there are no entries of sales, in the French government books, corresponding with the representations made by the defendant. The value of the evidence upon this part of the case must, of course, depend on the course of dealing on the French stock exchange, on the mode in which the French stock books are kept, in the ceremonies to be observed in effecting transfers. The plaintiff has not examined persons who are daily engaged in making transfers of French stock, and who are able to speak as to the inference to be drawn of the reality of a sale, from entries appearing or not appearing, on particular days, in the French books, of the particular sums in which the sale is represented to have been made; but he has examined a clerk to the plaintiff's solicitor, and another gentleman of whom we know nothing, except that he resides in a particular street in Paris. Both these witnesses represent that they have made themselves acquainted with the course of transfer in the books at Paris, but they have not thought fit to communicate to the court any information whatever upon the subject. Neither of them ventures to state that, according to the course of dealing on the stock exchange at Paris, these entries would or could find their way into the transfer books at the period when the sales were effected. The contracts might have been made on one day, and the transfers on another. In the course of these very transactions, the plaintiff was told that, before a transfer

could be made, the inscriptions must be transmitted to Paris, and be examined; and that then some person must appear with a power of attorney, on the part of the vendor, to make the transfer. Neither of these witnesses is qualified to speak upon the subject, as to which he has been examined. Either the officers of the treasury, the persons who had the custody of the books, or the bankers or brokers of Paris ought to have been resorted to. These gentlemen however do not venture to swear that, on the 27th, 28th, or 29th of May 1819, there was no transfer, by Rothschild, Brothers, of 110,000 rentes, but only that there was no transfer made by them of 110,000 rentes in the specific proportions in which those rentes are represented to have been sold; but the plaintiff himself has proved that, on the 28th of May, the day on which Messrs Rothschild represented that the sale of the 110,000 rentes was effected, transfers were made by them to the amount of 120,950 francs. This sum was the amount of all the transfers that Rothschild had to make in the course of the day: for it is the practice of bankers and brokers to wait till the end of the day before they make their transfers, and then to make them in one sum. Therefore the fact of their being no corresponding entries in the books, affords no ground for saying that the plaintiff's rentes were not sold on the 28th of May.

Upon this transaction the plaintiff sustained a loss, but it was not caused by the advice of Mr Rothschild: for the necessity for the sale arose from the terms of the contract which the plaintiff had entered into. It is said that Mr Rothschild advised the plaintiff to send an express to Paris, for the purpose of selling his rentes there, rather than in London; but there is no evidence that the plaintiff sustained the least injury by so doing. Whether he did or did not sustain any injury is immaterial, for Mr Bell, not Mr Rothschild, was his agent. However the plaintiff was dissatisfied with the sale of the rentes, and, in consequence of that disappointment, Mr Rothschild consented that the credit for the money he had lent should be extended, and that a re-investment of the proceeds of the rentes should be made without any charge for commission. The plaintiff accepted these terms, and accordingly, sent instructions to Paris to have the re-investment made. Now, with respect to that part of the case, it has been said that Mr Rothschild was the plaintiff's agent. But the fact is, that Mr Rothschild had nothing to do with that re-investment, except that he sent the order, to Paris, enclosed in a letter to Rothschild, Brothers, and desired them to do the best they could for the plaintiff; and the account of the re-investment was sent, by Rothschild, Brothers, to the plaintiff himself. Then it is said there was no re-investment; and the plaintiff attempts to prove it, by the testimony of the two witnesses, the value of whose evidence has been already examined. It is well known to all persons engaged in transactions in the French funds, that, when purchases are effected, it seldom happens that the entries of the transfers are made on the day of sale. Three months afterwards, the plaintiff (as he says) by the persuasion of the defendant, went over to Paris for the purpose of superintending the sale of his 105,500 rentes. That sale was effected; and Rothschild, Brothers, of course, received the amount, because they were to remit it to Mr N. M. Rothschild; and it was remitted to him accordingly. It is said that this re-sale was a fictitious transaction, as

well as the re-investment. But if it was the defendant's intention to practise a fraud on the plaintiff, in representing as a real transaction that which had no existence, is it probable that the defendant would have advised the plaintiff himself to go over to Paris and take his broker with him, in order to superintend the re-sale. Again it is said that these transactions did not take place, because there were not entries in the books corresponding with them. But the existence of these sales is proved by the evidence for the plaintiff, by which it appears that they were effected under the immediate superintendence of the plaintiff. It is a conclusive answer to the inference which it was attempted to draw from the non-existence of corresponding entries in the former case, that there is a similar non-existence of entries where transactions are proved, to demonstration, to have existed.

The letter, from the defendant, to his brothers, containing the cautions with respect to the plaintiff, might have been to this effect: that the plaintiff was fond of speculation; that he might wish to engage in further speculations, and to continue his money in their hands; but that it was not advisable to give him credit beyond a certain extent. Mr Bell could not be taken to Paris for any other purpose than to give, to the plaintiff, the benefit of the knowledge he possessed of the mode of dealing in French securities, and of the information he might acquire with respect to the probability of the rise or fall of the French funds. Therefore the evidence and the circumstances themselves prove that he must have acted as the adviser and agent of the plaintiff. On this transaction the plaintiff makes a profit of between 2,000*l.* and 3,000*l.*

In the month of December 1819, the plaintiff, with the assistance, and in the presence of his broker, settled his account with the defendant, and gave a draft for the balance.

With respect to the charges for commission and interest, and the expenses of the express, in the first place the plaintiff saw them at the time when he settled his account. It is proved to have been part of the contract that the defendant should receive interest, and it was secured by the promissory notes which he held. With respect to the expenses of the express, who was to pay them? The plaintiff had sent the express to Paris, at the recommendation of the defendant; but was the defendant, because he advised the plaintiff to send the express, for the purpose of effecting a more beneficial sale, to pay the expenses of it. Besides, the plaintiff received satisfaction for the supposed injury by the profit which he made on the subsequent transaction. Then the commission is charged on the receipt of the money by Rothschild, Brothers, who were the plaintiff's agents, and not the agent of Mr Rothschild.

During the year 1820, the plaintiff continued to speculate in the French funds, and to employ Rothschild, Brothers, as his agents in those speculations, and he repeatedly settled accounts with them. He afterwards speculated to a great amount in almost every public and private security that was then in the market.

Now, after the account with the defendant has been settled for ten years; after an interval of five years between the period at which the plaintiff finally settled his account, and the period at which he filed his bill, the defendant is to be dragged into a court of justice, and to be called upon to prove all these transactions, which the plaintiff himself has admitted, and confirmed.

[Brookman *v.* Rothschild.]

If the plaintiff has any cause of complaint, he must, in addition to substantiating all the grounds of it, satisfy the court that the discovery of the facts, which have given rise to his bill, is a recent discovery. An allegation to this effect has been introduced into the bill, but no evidence has been produced in support of it. The relief which the plaintiff asks is of such a description, that it can not be granted to him if he has been guilty of the slightest delay in bringing forward his complaint. The object of this bill is to obtain a replacement of stock. It is exactly the same as a bill for the specific performance of a contract respecting stock. Stock, both foreign and domestic, is an article which fluctuates from hour to hour, and as to which courts of equity have refused to enforce any contract whatever; because a contract respecting stock is one in which justice can not be done by a specific performance, inasmuch as specific performance must take place at the date of the decree, and the plaintiff, at the time, instead of finding a benefit from the transfer of stock, may experience the reverse. On the other hand, nothing could be more unjust than that the fluctuations in the prices of stock, since the transaction took place, should have the effect of throwing a loss upon the defendant. The only mode of giving relief on a stock transaction, is by giving the party the amount of the damage he has sustained. That damage he can recover at law; and, therefore, to law the court leaves him. But even if that objection did not apply, it is essential that the party, the moment he knows the facts, should bring forward his claim. The plaintiff here has waited till stock has greatly risen in value, and then comes for relief, which, instead of being a benefit, if he had asked for it at the time, would have been a detriment. The same observation applies to each of these transactions. The letters which the plaintiff wrote to the defendant and his brothers, in the year 1823 and 1824, afford strong evidence that he was not ignorant of the facts which he now complains of, at the time he settled the account, or, at all events, that he knew of them some months before he filed his bill. In one of those letters he makes a demand of a small arrear of interest from Rothschild, Brothers, (which also shows that he treated them as his agents in the transaction as to the 110,000 rentes); and, in another letter, which he wrote to the defendant, he says that, on stating the circumstances to his professional adviser, he had suggested that the plaintiff had good grounds of complaint. It is clear, therefore, that the result of the communication with the attorney was not an investigation which led to the discovery of these pretended facts, but that the result of the consultation with the attorney was that, on the statement of the facts within the knowledge of the plaintiff, his attorney advised him that he had good ground of complaint.

The following cases were cited by the defendant's counsel: Coles *v.* Trecothick, 9 Ves. 234; Andrews *v.* Mowbray, Wilson's C. C. 71; Hennings *v.* Rothschild, 4 Bing. 315; Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

The Vice-Chancellor:—The bill in this case states circumstances which, upon comparison with what is said of them in the answer, and in the evidence, are of this nature. The plaintiff was, in the month of

May 1818, entitled to 20,000 French rentes; and it appears that there had been some communication, between him and Mr N. M. Rothschild, who carries on business in this country, and who is also, a partner, with his brothers, in the house established at Paris, under the name of Rothschild, Brothers. And it appears that a correspondence had taken place, between the plaintiff and Mr. N. M. Rothschild, and it is represented that the plaintiff was induced, by the letter which was written, by Mr. Rothschild, to give an order for the sale of the French rentes. It does not seem to me to be very material, for the purpose of determining what relief the plaintiff may be entitled to, to ascertain whether or not the plaintiff did give the order in pursuance of the recommendation of Mr. Rothschild; but I must remark, because it concerns the character of Mr. Rothschild, that the letter which is represented to have contained the recommendation to sell the French rentes, did not recommend that sale, but contained these words: "French stock here is about 69⅛, and Prussian bonds 82 per cent. and 83 per cent. I think you would do well to sell part of the former and invest it in the latter." The fair construction of that letter, is that it is a recommendation that *part only* of the French rentes should be sold, and the produce of that part invested in Prussian bonds, leaving it quite to the discretion of the person to whom the letter was addressed, what portion should be sold. In the letter of the 24th of May, which the plaintiff wrote in reply, he says: "I observe that you quote at about 69 in London. Shall I beg the favour of you to cause my 20,000 rentes to be disposed of to-morrow, on the best possible terms, both as to price and exchange? The produce you will have the goodness to retain in your hands until I have determined how to dispose of it, unless there would be a saving of commission in purchasing Prussian bonds immediately with it, so as for the sale and purchase to be considered as one transaction; in this case I would wish it to be immediately done." In consequence of that letter Mr Rothschild does sell, as he represents, the whole of the 20,000 rentes. I say, as he represents, because he writes a letter of the 25th of May, in which he says: "Sir, I have the pleasure to acknowledge the receipt of your favour of yesterday, and, having had an opportunity to dispose of your 20,000 rentes, at 69 per cent. and 23.90, I have embraced the same, and beg to enclose you the last printed prices, by which you will perceive that, on the 21st, they were only 68.25 per cent.; therefore I feel confident that you will approve of this transaction. I have invested the proceeds of this sale in Prussian bonds, say 19,000 bonds at 82½ per cent., which is the very lowest it could be obtained at." That letter of the 25th of May was a direct and plain representation that Mr Rothschild had, in pursuance of the letter of the 24th of May, made a sale of the 20,000 rentes. The fact, however, was that there was no sale of the 20,000 rentes, but Mr Rothschild took them to himself, and gave the plaintiff credit for the price of them, at the rate per cent. quoted in his letter, and he invested the amount in the purchase of Prussian bonds. The first question then on this case, is whether that transaction with regard to the sale of the French rentes shall stand; and my deliberate opinion is that that transaction ought not to stand; because, independently of the question whether there was more or less of confidential agency on the part of Mr Rothschild, the very least that can be said, is that Mr Rothschild was made

an agent to sell, by the letter of the 24th of May, and his determination to act upon it. And I conceive that it was his bounden duty, therefore, to sell to a third person, and not to take the rentes to himself and give the plaintiff credit for the price, although I am bound to admit that it was the fair price of the day. It appears, from what he states in his answer, that he had another transaction with respect to French rentes, on that very same day, and that he himself sold a quantity of French stock, I think, for a less price than that for which he charged himself to the plaintiff in respect of his taking to himself the plaintiff's 20,000 rentes. But I apprehend that the general principle which this court has always acknowledged and upheld, must be maintained in this case, namely, that the person who is the agent to sell, if he accepts the agency, is bound to sell, and is not at liberty to take, to himself, the stock, and give credit for the amount of its price. It has been said, in the argument for the defendant, that, if such a construction is put on this transaction, it will tend to undermine many transactions which daily takes place in the great houses in London. But my opinion is that, whether that is or is not the case, an individual has a right to complain of a transaction in which his agent does not do that which he is employed to do, and represents to his employer that he has done that which he was directed to do, whereas he has done quite a different thing. No evidence, however, has been given to me to show that any such act as that which is now complained of, is an act which is daily taking place among the great commercial and banking-houses in London; and, therefore, I must consider it only as a speculative argument, which, at present, does not appear to be founded in fact. On this transaction, therefore, the plaintiff is entitled, at his option, either to have the present price of 20,000 rentes, or to have invested in his name 20,000 rentes, he repaying to Mr Rothschild the 11,548*l.* 2*s.* 4*d.*, which was the sum for which he had credit in account with Mr Rothschild; and he must repay that sum with interest at 5 per cent.

The next part of the case relates to the purchase of some Prussian bonds; and it appears that, about the month of June 1818, Mr Rothschild, as the plaintiff represents it, recommended him to purchase Prussian bonds; and that he agreed to purchase, from Mr Rothschild, 40,000*l.* Prussian bonds at 82, and he also purchased from him 5,000*l.* other Prussian bonds at 81¼, and 5,000*l.* other Prussian bonds at 81 per cent. For these bonds the plaintiff was not able to pay; but the transaction was, in effect, that the plaintiff should give his promissory note for the price; and that Mr Rothschild should retain the 50,000*l.* bonds as a collateral security: and the transaction was carried into effect, according to that understanding, because there was a purchase, apparently made, of bonds to the amount of 50,000*l.*, for which the brokers made out a charge of 41,522*l.* 4*s.* 10*d.*, and the plaintiff gave his promissory note for 41,500*l.*, part of that sum, and paid the remainder in cash to Mr Rothschild. These purchases were made on the 2d and 15th of June 1818. It appears that the plaintiff had purchased bonds to the amount of 15,000*l.* of other persons, in the months of April and May 1818; and he afterwards purchased bonds from other persons, to the amount of 5,000*l.* The plaintiff having borrowed of Mr Rothschild two sums of money, first of all the sum of 8,500*l.*, and afterwards the sum of 4,200*l.*, for the purpose of securing to Mr Roths-

child the payment of the two promissory notes which the plaintiff had given for those two sums, he, in the first instance, deposited with Mr Rothschild, 11,000*l.* of bonds, and next, 6,000*l.* bonds. So that there was an actual deposite made of bonds, to the amount of 17,000*l.*, and these bonds are specifically described in the schedule to the answer, and it appears that they comprehended the 15,000*l.* bonds purchased of other persons, and 2,000*l.* bonds of those which were purchased with the produce of the 20,000 French rentes. In the month of October, an account was made out which showed what was due in respect of the 50,000*l.* bonds. In December following, all the bonds, both the 50,000*l.* bonds and the 17,000*l.* bonds, were sold at the rate of 75 per cent. The consequence was that the plaintiff suffered a considerable loss, because he had purchased the bonds, on the average, at about 81 per cent., and he sold at 75 per cent. With the produce of the bonds, the promissory notes for 41,500*l.* and 8,500*l.* were considered as satisfied; but there remained the promissory note for 4,200*l.* in respect of which the deposite of the 6,000*l.* bonds was made: and inasmuch as the proceeds of the 67,000*l.* bonds would not pay off that, as well as the two other promissory notes for 41,500*l.* and 8,500*l.*, the plaintiff made a further deposite, with Mr Rothschild, of some bonds, to the amount of 5,500*l.*, which were afterwards disposed of; and thereby, the promissory note for 4,200*l.* was paid, and the surplus of the proceeds was accounted for to the plaintiff. It is observable, on this part of the transaction, that there was no money whatever paid, by the plaintiff, in the first instance; and the way in which the plaintiff has suffered an injury has been, that he has been, in effect, compelled to pay the difference between the price of the 50,000*l.* bonds and the price at which they were sold, out of the proceeds of the 5,500*l.* bonds which he last deposited, because, by the means of the produce of those bonds, and by those means only, was there ultimately made a liquidation and payment of the three promissory notes.

Now the question is, whether this transaction shall stand; in other words, whether the plaintiff is not entitled to have repaid to him such sums of money as he has lost in the way I have described.

I apprehend that it was absolutely necessary, in order to support the transaction, that it should appear that there was a *bonâ fide* purchase of 50,000*l.* bonds. But I think that it does appear, most distinctly, from what the defendant himself represents in his answer, that there was no *bonâ fide* purchase of 50,000*l.* Prussian bonds; because, in his answer, he himself states that he never selected any bonds in respect of the 50,000*l.* bonds. According to the construction which I put on the letters that passed, and the broker's evidence, there ought to have been a selection of 50,000*l.* bonds, and an appropriation of them. There should have been a statement made to the plaintiff, of what were the numbers of the bonds, for a reason (amongst others) that struck me very forcibly, when I read the scheme for the Prussian loan, namely, that the Prussian bonds were liable, from time to time, to be redeemed, and there was a particular course to be taken for the redemption of them; and it was necessary, therefore, that every person should distinctly know, by the numbers of the bonds, what were the bonds in which he had an interest. But it was quite impossible for the plaintiff, at any time during these transactions, to know what were the specific bonds

which it was represented had been purchased for him. I take it, upon the evidence, to be perfectly manifest that there was no purchase at all of the 50,000*l.* Prussian bonds. The transaction, therefore, is bottomed in a representation which turns out not to be true; and, from the effect of that transaction, I apprehend the plaintiff has a right to be relieved, on the plain principle which has always been acknowledged in a court of equity, namely, that mankind shall be bound by the representations they make, and, if they make false representations to those who deal with them, they must take the consequences of their own false representations. I apprehend, therefore, that, on this part of the case, the plaintiff is entitled to be relieved by having the account opened, so that there shall be repaid to him that sum with which he was charged by way of loss in the manner I have stated.

I observe that, as to this part of the case, the plaintiff has asked such relief as I can not think he is altogether entitled to receive, because he asks relief, on the supposition that the 50,000*l.* bonds themselves were sold in a way that he did not authorize. But if the transaction is to be considered as one which fails altogether, by reason of there never having been any purchase, it is quite impossible to give relief on that supposition.

In respect of the sale of the 17,000*l.* bonds, the bill prays that Mr Rothschild may be charged with the actual value or price of the 17,000*l.* Prussian bonds, with interest thereon at 5 per cent. from the time Mr Rothschild actually sold the same. With respect to that part of the transaction, it seems to me that I am not at liberty to give any relief; because a passage of the answer that was read for the plaintiff, states, most distinctly, that the plaintiff himself consented to the sale of the 17,000*l.* bonds, on the representation that Mr Rothschild made to him, that at any time he might have bonds of an equal amount. He says that when the bonds were deposited with him, he stated that he might have occasion to deliver out Prussian bonds to purchasers, and that, as he wished to avoid signing more than were necessary, he mentioned to the plaintiff that he should, in case of need, use his bonds, and that the plaintiff gave his full consent to his doing so, it being understood that the defendant would give him other bonds of similar amount at any time when required. Now this is positively sworn to in a passage in the answer that was read by the plaintiff, in order, indeed, that he might make use of it for another purpose; but the passage was read, and there is no evidence to contradict it: and my opinion is, that the defendant is entitled to have the benefit of it; and, therefore, with regard to these 17,000*l.* bonds, there can not be any relief.

I shall take this occasion to remark that the defendant has, in his answer, stated, generally, that the plaintiff, at the time he paid the balance on the final settlement of the accounts between him and the defendant, knew of all the circumstances of the transactions which took place between him and the defendant. But I must say that this general declaration stands in a very different situation from the statement as to the 17,000*l.* bonds; for on looking at the evidence, there appears to be no ground whatever to suppose that the plaintiff could have known all the real circumstances of the case with respect to which the defendant says he had knowledge. The whole course of proceeding shows that the plaintiff was acting on the supposition that the representations, from

time to time, made to him, were true; and, therefore, though I give the defendant the benefit of the statement which he has made with respect to that one transaction, I think it right to withhold from him the benefit of the statement as to the plaintiff's knowledge of all the transactions.

The last part of the case was this. In the end of 1818, and the beginning of 1819, there was an agreement that the plaintiff should purchase a large quantity of French rentes, which were not to be paid for till the month of June; and a representation was made to the plaintiff, that, at different times and in various sums, French rentes had been purchased to the amount, altogether, of 115,000 francs. In the month of May 1819, 5,000 francs of these rentes were sold to Mr Blakesley, and the price of them was paid to Mr Rothschild. The plaintiff wishing to sell the remaining 110,000 rentes, by the recommendation of Mr Rothschild, an express was sent to Paris, and the remaining rentes were sold, and thereby a loss was sustained, by the plaintiff, to the amount of 4,830*l.* 18*s.* 6*d.* The plaintiff was desirous, soon afterwards, to have a re-investment of the produce of the 110,000 rentes; and he was, afterwards, informed that the proceeds had been invested in the purchase of 105,500 rentes. In the month of September the plaintiff was induced to go to Paris, with his broker, for the purpose of having the 105,500 French rentes sold. Communications took place there, between the plaintiff and Messrs Rothschild, Brothers, and, on the 22d of September, the 105,500 French rentes were stated to have been sold. The plaintiff was a gainer upon this last transaction, but not to a sufficient amount to contervail his loss upon the preceding one; and when the account was finally made out, in the month of December 1819, it appeared that there was a sum of 1,614*l.* 19*s.* 2*d.* due, and which the plaintiff paid to Mr. Rothschild. The question then is whether, in respect of the circumstances that relate to this alleged purchase and sale, alleged re-purchase and re-sale, the plaintiff is entitled to relief. That will depend on the questions, was there any purchase, was there any sale, was there a re-purchase, and was there a re-sale? In the first place, the plaintiff has expressly charged, by his bill, that all these sales and re-sales were false and fictitious; and, on reading the defendant's answer, I do not perceive that he ventures, in direct terms, to traverse that allegation. Now it is remarkable that the defendant himself, has stated, in his answer, a circumstance which would have afforded a very easy method of proof whether the sales were true or false. For he says, in his answer, that, in all sales of French rentes it is necessary for the seller, in whose name the rentes are inscribed, to give over the certificates denoting the inscriptions to have been made in his name, with a power of attorney, to the purchaser, to have the rentes transferred into his name. Consequently, if there had been this first purchase and this sale, and this re-purchase and re-sale, it would have been easy, by producing the certificates and power of attorney, to have manifested that that really took place which the plaintiff says did not, and which I do not perceive that the defendant says in express terms, did take place. The plaintiff has entered into evidence to show that, in point of fact, no such transactions took place. I am quite willing to give effect to the observation, made by the defendant's counsel, that the evidence offered by

the plaintiff, on this point, is not the most cogent and conclusive that might have been obtained; but it is some evidence, and I am of opinion that the *onus* of proving that the transaction was real, lay on the defendant; but I looked over the defendant's evidence, in vain to find one particle which goes to show that any one part of this transaction was real.

There are, too, circumstances of suspicion attending the correspondence, which can not fail to make on the mind of any person who reads it, an impression, and a very strong one, that there was something that was unreal, which it was an object with Mr Rothschild and his Brothers to have concealed; because, in that letter which was written, on the 20th of September 1819, by Messrs Rothschild, Brothers, to Mr Rothschild in this country, there is this expression: "Due attention will be paid to your cautions, respecting Mr Bell and Mr Brookman." And it does not appear, from any of the letters, or copies of letters, that were produced, what were the cautions which had been so communicated to Messrs Rothschild, Brothers, by Mr Rothschild. It is evident, therefore, that something took place which does not now appear; and that Mr Rothschild himself thought it necessary to give cautions respecting this matter, which if it were simply a matter taking place in the way in which it was represented, it would have been absolutely unnecessary to give any caution about. My opinion therefore is that, on this part of the transaction Mr Brookman is entitled to be relieved, by having repaid to him all those sums of money which, in respect of these alleged transactions, he did actually pay to Mr Rothschild; (and as the course of the dealing between the parties, was to charge 5 per cent.) I think all the sums of money which have been so paid, whatever they were, ought to be repaid, with interest at 5 per cent., from the time they were paid.

It has been said, on the part of the defendant, that the plaintiff has applied a great deal too late, to the court, for relief. There would be something in the observation provided it could have been made out that the plaintiff might have applied sooner. But there is no evidence whatever, that the plaintiff did know, long prior to the filing of the bill, what the real transactions were. The letters which he wrote in the end of the year 1823, and in the month of January 1824, convey to my mind the most satisfactory evidence that the plaintiff did not know the real nature of the transactions. He writes in a most humble manner, supplicating for a small loan, because of the state of extreme penury to which he had been reduced; and he states that, in looking over his papers, he found some trifling amount of interest which had not been allowed, and in respect of which he makes a claim. It appears that a small sum had been sent to him, from Messrs Rothschild, Brothers, that the application was renewed to Mr N. M. Rothschild, which was not noticed; and the consequence was that the bill was filed. Now the conduct of men appears to me, generally speaking, to be much better evidence of the real state of a case, than what they say: and here I find this person putting himself in the form of a suppliant, asking for a gratuity, and demanding a small pittance in respect of a miscalculation of interest. It is, therefore, evidence to my mind, that the man who so wrote could not really have known what was the magnitude of his legitimate demand against Mr Rothschild. My

opinion, therefore is, that the plaintiff has come to the court with sufficient speed, and that he is entitled to have the relief which I have pointed out, as to the different portions of the case, as I have gone through them. I think also, considering the nature of the case, that the plaintiff is entitled to have his costs paid*.

## Brown *v.* Claxton.

3 *Simons*, 225.

A testatrix, who died in 1782, gave an annuity to A. B. and devised her real estates to M. and his sons, in strict settlement, and bequeathed her personal estate to M. absolutely. Down to 1821, the annuity was paid by the persons, in possession of the real estates, and no fund for payment thereof was ever set apart out of the testatrix's personal estate, although that estate was administered in a suit instituted by her legatees, to which A. B. was a party, and in which the annuity was erroneously considered as not primarily charged upon the testatrix's personal estate. M. bequeathed his personal estate to L. and died. L. afterwards died, and one of the defendants was her executrix: Held that A. B. had no claim, upon L.'s estate, in respect of his annuity.

November 13, 17, 1829.

DAME MARGARET BROWN, by her will, dated the 31st of May 1779, and duly executed and attested to pass freehold estates, gave an annuity of 300*l.* a year, clear of land-tax, to the plaintiff, Sir William Augustus Brown, for his life; and, after giving several legacies of money and stock, she gave four annuities to different persons, which she charged on her real estates; and then she devised those estates, subject to the aforesaid annuities, to Humphrey Morice, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of Humphrey Morice, successively in tail-male, with the ultimate remainder to Edward Candler, in fee; and she gave the residue of her personal estate, after payment of her debts, legacies and funeral expenses, to Humphrey Morice; and appointed him and John Crookshanks her executors.

In February 1782, the testatrix died, and, in March of the same year, the executors proved her will, and possessed her personal estate, which was more than sufficient to pay her debts, legacies and funeral expenses; and Humphrey Morice entered into the possession of her real estates.

No fund for payment of the annuity given to the plaintiff, was ever set apart out of the testatrix's personal estate; but, down to the 25th of March 1821, that annuity was paid, by Humphrey Morice, and the persons who successively became entitled to the testatrix's real estates under her will.

In 1785, Humphrey Morice died, having, by his will, dated the 24th of July 1782, devised part of his real estates to J. Claxton, in fee, and the remainder to William Burrell and John Claxton, in trust to sell,

* This decision was affirmed by the House of Lords, in March 1831.

and after paying his debts, to invest the proceeds and the residue of his personal estate in the usual securities; and to pay the interest thereof to Levina Luther, for life; and after her decease, to divide the capital between Elizabeth Bull and Catherine Bull, and he appointed Burrell and Claxton his executors; and those gentlemen proved his will, and performed the trusts thereof.

In May 1787, Levina Luther, Elizabeth Bull and Catherine Bull agreed to divide equally among themselves the property to which they were entitled under the will of Humphrey Morice. On the 5th of December 1787, Crookshanks rendered a final account, to Burrell & Claxton, of his receipts and payments in respect of Lady Brown's estate, and paid to them 3,035*l.* 7*s.* 5*d.*, the balance of his account, which was afterwards paid over to Levina Luther, Elizabeth Bull and Catherine Bull, and the accounts and papers relating to Lady Brown's estate were, about the same time, delivered up to those ladies. Burrell & Claxton, at different times afterwards, received, from Lady Brown's estate, sums of money, which, including the 3,035*l.* 7*s.* 5*d.*, amounted to 4,836*l.* 2*s.* 4*d.*

Burrell died in the lifetime of Claxton. In 1795, Crookshanks died, and his two daughters were his personal representatives. They both died before the bill was filed. In the latter end of the year 1795, Catherine Bull died, having by her will given her real and personal estates to Richard Bull and Elizabeth Bull, and appointed them her executor and executrix, and they afterwards proved her will. In 1805, the real estates of Morice devised to be sold, were sold; and on the 23d of March in that year, Levina Luther, Elizabeth Bull and Richard Bull executed, to John Claxton, a deed whereby they released and indemnified him in respect of any act which he had done as the surviving executor of H. Morice, in respect of accounting for and paying over the residue of the real and personal estates of H. Morice; but that deed had no reference to the annuity of 300*l.* In February 1806, Richard Bull died, intestate, leaving Elizabeth Bull his heir at law, and she took out letters of administration to him. Elizabeth Bull died in 1809, having appointed Richard Henry Alexander Bennett and Levina Luther her executor and executrix; and they afterwards proved her will. On the 19th of February 1815, Mr Bennett died; and in April following Mrs Luther took out letters of administration *de bonis non*, to Richard Bull. In 1811, Claxton died, having appointed his wife, the defendant, Elizabeth Claxton, his executrix. She proved her husband's will, and possessed his personal estate. Mrs Claxton also became, upon her husband's decease, the personal representative of Humprhey Morice. She did not possess any part of his personal estate; but she entered into the possession of a real estate, which had been devised by him to her late husband. Levina Luther died in January 1822, having bequeathed the whole of her property to the defendant, Elizabeth Amelia Bennett, and appointed that lady her executrix. Mrs Bennett proved the will, and possessed the personal estate of Levina Luther; but she did not possess herself of any part of the personal estates either of Elizabeth Bull or Catherine Bull, the same having been paid over to the residuary legatees under their wills: nor did Mrs Bennett possess any of the assets either of Lady Brown or Humphrey Morice.

In February 1794, a commission of lunacy issued against the plain-

tiff, Sir William Augustus Brown, under which he was found to have been a lunatic, from the 14th of January preceding; and the plaintiff, Trevor Hull Lethem, was appointed his committee.

The bill stated that Levina Luther was possessed of very considerable personal estate, consisting, in a great degree, of what had been received by her in respect of her share of the residue of the real and personal estates of Humphrey Morice; and it contained similar allegations with respect to Elizabeth and Catherine Bull. It further stated that it was supposed that Sir W. A. Brown's annuity was charged upon Lady Brown's real estates, by her will; that that annuity continued to be paid, up to the 25th of March 1821, by the persons successively entitled to those real estates, and that, in consequence thereof, the attention of Sir W. A. Brown was not called to the necessity of requiring that a fund should be set apart, out of Lady Brown's personal estate, possessed by Morice to secure the growing payments of that annuity: that, some time in the year 1821, it was intimated, by the person in possession of Lady Brown's real estates, that the annuity had been paid, by mistake, by the owners of such estates, and that such payments would thenceforward be discontinued, and that the same were discontinued accordingly; that there had been no personal representative of Lady Brown, since the decease of John Crookshanks, and that the plaintiffs were advised that the defendants, Mrs Claxton and Mrs Bennett, or one of them, were or was entitled to take out letters of administration to Lady Brown, but that they declined to apply for the same.

The bill prayed that the defendants, Mrs Claxton and Mrs Bennett, or one of them, might be decreed to pay to the plaintiff, Sir William Augustus Brown, the arrears of the annuity of 300*l.*, and to secure the future payment thereof; that an account might be taken of the personal estate of Lady Brown, possessed by Humphrey Morice, or by John Claxton, after his decease, and, also, of the personal estate of Morice, possessed by William Burrell and John Claxton, and, if such personal estate should appear to be insufficient to pay his funeral expenses and debts, then that the deficiency might be made good by means of his real estates, which were charged by his will with the payment of his debts; and that an account might be taken of the rents and purchase-moneys of those estates which had been received by Burrell and Claxton; and, if necessary, that an account might be taken of the personal estate of John Claxton, and also of the personal estates of Catherine Bull, Elizabeth Bull, Richard Bull, and Levina Luther.

Mrs Claxton, by her answer, denied that she had possessed any part of the personal estate of Humphrey Morice, and said that she believed that, for upwards of 30 years, no claim was ever made, by or on the part of the Plaintiffs, either to her late husband or to John Crookshanks, for payment of the annuity of 300*l.*, and that the property of Lady Brown and Humphrey Morice had been distributed, and disposed of, or dealt with, upon the faith or supposition that no such claim existed; and she submitted that she ought not to be compelled to answer such claim. Both Mrs Claxton and Mrs Bennett set forth, in their answers, the proceedings in a cause, commenced in this court, in December 1784, by Anne Cecil and some of the other legatees under the will of Lady Brown, against her executors and the executors of

[Brown *v.* Claxton.]

Sir James Brown, who claimed to be creditors to a very large amount upon the estate of Lady Brown, and also against the plaintiff Sir William Augustus Brown, the son and heir of Sir James Brown, for the purpose of having the legacies, given by Lady Brown's will, paid. At the commencement of this suit the plaintiff, Sir William Augustus Brown, was 20 years old. On the 19th of June 1786 the cause was heard, before which time, he had attained the age of 21. By the decree in that cause it was referred, to the Master, to take an account, of what was due to the creditors of the testatrix, Dame Margaret Brown, for their debts. The Master reported that he had been attended by the solicitors for the plaintiffs and defendants, except for the defendant Sir William Brown, for whom no one had attended, although duly summoned: that no debt had been claimed before him save a debt amounting to 400,000*l.* and upwards, on the part of the executors of Sir James Brown; but that he did not find that anything was due in respect of the claim. The claimants, thereupon, took exception to the report; and, on the 16th of May 1787, the cause was heard on the exceptions and for further directions; and the exceptions were then overruled: and Humphrey Morice and John Crookshanks having admitted that the testatrix died possessed of bank 3 per cent. annuities, sufficient to answer the several specific bequests of like annuities to the several persons named in her will, and also admitting assets of the testatrix to answer and pay the several pecuniary legacies given by her will, and the several annuities thereby given, to which her personal estate was primarily liable; it was ordered that John Crookshanks, the surviving executor of the testatrix, should transfer and pay the several specific legacies therein mentioned: and the Master was directed to take an account of the testatrix's pecuniary legacies, and the arrears of the annuities that were primarily a charge on her personal estate: and Crookshanks was ordered to pay what should be found due for such arrears and legacies. And it was also ordered that the Master should appropriate and set apart sufficient of the testatrix's personal estate to answer the annuities which he should find were primarily charged on the personal estate of the testatrix, and that what should be so appropriated should be paid, into the bank, to the credit of the cause. And the court declared that the clear residue of the testatrix's personal estate belonged to Humphrey Morice, and ordered that the same should be assigned to William Burrell and John Claxton, his executors.

The Master, by his report, made in pursuance of the last mentioned order, on the 7th of July 1787, certified that he had been attended by the solicitors for the several parties interested, and that the stock legacies payable under the testatrix's will, amounted, in the whole, to 37,300*l.* 3 per cent. consul bank annuities, and that the interest thereon amounted, in the whole, to the sum of 6,154*l.* 10*s.* The Master also set forth an account of the several pecuniary legacies given by the testatrix, and the interest due thereon, amounting together, in the whole, with such interest, to the sum of 6,692*l.* 2*s.* 5*d.*, and the Master certified that he did not find that there was any annuity given by the testatrix which was primarily charged on the testatrix's personal estate. The Master then certified that he had taxed the costs of Sir William Augustus Brown, at the sum therein mentioned. This report was afterwards confirmed.

[Brown *v.* Claxton.]

The defendants, Mrs Bennett and Mrs Claxton, submitted that the plaintiff, Sir W. A. Brown, being a party to the suit of Cecil *v.* Morice, and being of full age at the time of the decree, and not being a lunatic at the time of any of the proceedings therein, was competent, with the advice and assistance of his professional agent, to attend to and protect his own interest; and that he or his agent would not have suffered, or the court have permitted Lady Brown's personal estate to be disposed of and distributed as it was, without providing for his annuity, if the same had been chargeable on Lady Brown's personal estate; and they also submitted that that annuity was primarily chargeable upon Lady Brown's real estates, and that it was so considered and treated and adjudged in the suit of Cecil *v.* Morice; but, if the court should be of opinion that Sir W. A. Brown's annuity was not primarily charged on Lady Brown's real estates, then that it ought to be presumed, from the length of time during which that annuity had been paid out of her real estates, and from the proceedings in the suit of Cecil *v.* Morice, that some arrangement had been made between Sir W. A. Brown and the several other persons interested, by which the annuity was agreed to be charged upon, and made payable out of Lady Brown's real estates: and that, at all events, as the personal estate of Lady Brown had been, many years ago, applied and distributed, under the directions of the court, in that suit, to which Sir A. Brown was a party, he could not object to any of the proceedings therein, or disturb the disposition of Lady Brown's property as arranged and settled in that suit, but was bound by the proceedings therein, and that he was not entitled to any relief so far as regarded Lady Brown's personal estate.

When the cause came on to be heard, it was objected, for the defendants, that the suit was defective, on account of there being no personal representative of Lady Brown before the court. Upon which the Vice-Chancellor ordered that the cause should stand over: and W. H. Allen having afterwards taken out letters of administration *de bonis non* to Lady Brown, the plaintiffs filed a supplemental bill against him. Allen, by his answer, denied that he had received any part of Lady Brown's personal estate, and said that he believed that her executors had received the whole of it.

The original and supplemental causes now came on to be heard.

The Solicitor-General and Mr Tinney, for the plaintiffs, said that the cause of Cecil *v.* Morice had no reference to the question, whether Sir W. A. Brown's annuity was charged on Lady Brown's real estates; that it was instituted by her legatees, for the purpose of having their demands satisfied, because the executors had said that, by a claim of a debt of 400,000*l.* and upwards, their hands were stopped: that the statute of limitations was not relied on, in the answers in this cause, as a bar to the plaintiff's claim: and they cited Earl of Pomfret *v.* Lord Windsor, 2 Vez. 472.

Mr Horne, Mr Knight, and Mr Sanders, for the defendant Mrs Bennett, said that, according to the true construction of Lady Brown's will, the annuity of 300*l.* a year was charged on her real estates: that it was given clear of land-tax: that it had been decided, in the suit of Cecil *v.* Morice, that that annuity was not primarily charged on the personal estate: that Sir W. A. Brown was a party to that suit, and

might have excepted to the report; but that he allowed it to be confirmed absolutely: that the court could not hold that the annuity was charged upon Lady Brown's personal estate without overruling the decree in Cecil *v.* Morice, which the Vice-Chancellor had no jurisdiction to do: that, in 1785, Humphrey Morice died; and that then the two funds became separated, the real estates going to the devisees under Lady Brown's will, and the personal estate, to Mrs Luther and the Misses Bull: that Sir W. A. Brown had, for a long period of years, elected to look, to the real estates, for the payment of his annuity, and induced the owners of the personal estate to consider themselves discharged from that incumbrance; and that the assets of the testatrix could not be followed, after so great a lapse of time, especially as they had been distributed under a decree of this court.

(The Vice-Chancellor:—Does Mrs Bennett admit that he has possessed assets of Lady Brown?)

Certainly not.

Mr Pepys, for the defendant Mrs Claxton, said that the plaintiffs were entitled to no relief, as against her; and that therefore they must, at all events, pay her her costs.

The Vice-Chancellor. In this case the bill is filed by Sir William Augustus Brown, a lunatic, and his committee, against the defendants Elizabeth Claxton and Elizabeth Amelia Bennett, for the purpose of having an account of the personal estate of Lady Brown, who, by her will, gave an annuity to Sir William Augustus Brown.

One of the questions that has been made in the cause is, whether the annuity was chargeable on the personal estate of Lady Brown. It appears to me that it is impossible to entertain a doubt upon that question; for the annuity is given without any express words charging it on real estate, and, indeed, without any reference to real estate whatever, except such as may be implied from the expression, "free from land-tax," an expression which, to say the most of it, is ambiguous, and which, therefore, can not have the effect of making that, which in itself is a mere gift of an annuity, payable out of personal estate, chargeable upon the real estate.

It appears that Lady Brown appointed Humphrey Morice, and John Crookshanks, her executors, and devised her real estates to Humphrey Morice, for life, with remainders over; and Humphrey Morice was also her residuary legatee. She died in the month of February 1782. Morice & Crookshanks proved her will, and, after her death, a bill was filed, by several persons who claimed as legatees, against her executors, for the purpose of having satisfaction of their legacies, and of the annuities which were charged on the personal estate. This bill became necessary in consequence of a claim, made by two of the defendants in the cause, against her personal estate, to the amount of upwards of 400,000*l.* When the bill was filed, Sir William A. Brown, the annuitant, was an infant; but shortly afterwards he attained the age of 21. Humphrey Morice put in his answer, and then died, whereupon his executors, William Burrell and John Claxton, were made parties defendants, by bill of revivor. After there had been the usual decree, by which it was referred to the Master, to take an account of what was due to the creditors of Lady Brown, the Master proceeded on what

was referred to him, and stated in his report that he had been attended, by the solicitors for the defendants, except the defendant Brown, for whom no one attended, although duly summoned, and then he reported against the claim of those persons who made that large demand against the personal estate of Lady Brown. These persons then excepted to the report, and the exceptions were overruled; and then the court ordered the Master to take an account of the testatrix's pecuniary legacies, and the arrears of the annuities that were, primarily, a charge on her personal estate: and the Master was to compute interest on the legacies: and Morice & Crookshanks having by their answers, admitted assets to pay the legacies and the annuities which were primarily charged on the personal estate, it was ordered that Crookshanks should pay what should be found due for the arrears of such annuities, to the annuitants, and that the Master should appropriate and set apart sufficient of the testatrix's personal estate to answer the annuities which he should find were primarily a charge on the personal estate of the testatrix; and what should be so appropriated was to be paid into the bank in the usual manner: and then the court declared that the clear residue of the testatrix's personal estate belonged to Humphrey Morice, and ordered that the same should be paid, assigned and transferred to Burrell & Claxton, his executors.

It is perfectly clear that the object in making this decree, was to provide, in the first place, for these charges, in the way of annuities and legacies, which existed on the general personal estate of Lady Brown; so that that being ascertained, and provision being made for them, the clear residue of the personal estate might be handed over to the representatives of H. Morice.

In pursuance of the last-mentioned order, the Master made his report on the 7th of July 1787, and after stating that he had been attended by the solicitors of the several parties interested, and had caused advertisements to be published for the annuitants and pecuniary legatees of the testatrix to come in before him to claim their respective annuities and legacies, he found that certain of the legacies remained to be satisfied: and then he stated, that he did not find that there was any annuity given by the testatrix, which was primarily a charge on her personal estate.

Now no evidence was given, in the cause, to account for the fact that no claim was made, before the Master, in respect of the annuity that was given to the plaintiff Sir William Augustus Brown. It has been said that the reason why no claim was made, was that there was a mistaken notion of what was the construction of the testatrix's will. That might have been so; but it may also have happened that there was an arrangement, between the plaintiff, Sir William Augustus Brown, and those who represented the estate of Humphrey Morice, which had the effect of inducing Sir William Augustus Brown, not to make that claim which he might have made. Whether the non-claim by him arose from mistake, or from arrangement, or from any other cause, at this distance of time, it is impossible to tell, and it is useless, as it appears to me, to conjecture. But the fact was that the Master's report, having been made, was absolutely confirmed, according to the usual course of the court, all persons having been duly served with notice preparatory to making the order *nisi*, absolute. The effect of

that, therefore, was that, by the decree, which never was impeached or disturbed, those persons who represented the testatrix, Lady Brown, were obliged to hand over, the clear residue of her estate, to the representatives of Humphrey Morice.

Humphrey Morice, by his will had given the residue of his personal estate to Levina Luther, for her life, and after her decease, to Catherine and Elizabeth Bull; and it is represented that these three ladies agreed to devide among themselves, the personal estate of Humphrey Morice, and it is also represented that, on the 5th of December 1787, Mr Crookshanks, having rendered a final account, of Lady Brown's estate, to Burrell & Claxton, who were the executors of Humphrey Morice, which was approved by Levina Luther and Catherine and Elizabeth Bull, a certain sum was paid to Claxton, and the papers and accounts were delivered to those ladies; and Claxton paid over to them, in thirds, the sum which he had so received, and, from time to time, other sums were paid over to them, in like manner.

Burrell died in the lifetime of Claxton; and Claxton died in 1811; and Elizabeth Claxton was his executrix. With respect to the persons who where beneficially entitled, it appears, that, in the year 1795, Catherine Bull died, and Richard Bull and Elizabeth Bull were her executors, and both of them proved her will. Elizabeth Bull died about the year 1809; and R. H. A. Bennett and Levina Luther were her executors. Bennett proved her will, and died in the year 1815. Levina Luther then proved the same will, and then she who was the ultimate taker, by means of the arrangement and gift of the personal estate of Humphrey Morice, which included the residuary personal estate of Lady Brown, died in the year 1822, and she made Elizabeth Amelia Bennett her executrix, who thereby became, also, the personal representative of Catherine and Elizabeth Bull.

Now it is represented that the last transaction regarding the personal estate of Lady Brown, which had become the personal estate of Humphrey Morice, took place in the year 1805, when the final account was rendered. With respect to the annuitant, he had become of age before the first decree was made in the cause of Cecil *v.* Morice. In the year 1794, he became a lunatic; and the annuity was paid, after the death of Morice, not by the person who represented the personal estate of Lady Brown, but out of her real estates, up to the year 1821: and then it was that those who owned the real estates, discovered that they had been making payments in their own wrong; and, without doubt, they had been doing so, unless there was some arrangement of which I know nothing.

The present bill was filed in the year 1823; and the question, for the consideration of the court, is whether, after this lapse of time, it is or is not the right, of the annuitant and his committee, to have an account of those personal assets, which have been at various times, handed over to those who were beneficially entitled under the will of Humphrey Morice; or, whether the lapse of time, coupled with the proceeding in the cause of Cecil *v.* Morice, is not a sufficient bar to the claim.

Supposing that it ever was the intention of Sir William Augustus Brown to insist on having provision made out of the personal assets of Lady Brown, for the payment of his annuity, it was his bounden duty to have brought forward his claim, at any rate, before the report was

confirmed absolutely: and my opinion is that it must be taken that he did, knowingly and wilfully, allow that report to be confirmed absolutely, which was so confirmed for the purpose of enabling the representatives of Lady Brown to hand over what then appeared to be the clear residue of her personal estate.

But it has been said that he ought not to be prejudiced by the length of time, because there has been a mistake. In the first place, there is no proof of a mistake; but it was his duty to prevent there being a mistake. On whom did the *onus* lie to make a claim, but himself. It appears that the Master was actually attended by the persons interested, he being one of them. It is a general rule of this court, as it is the rule of a court of law, not to assist those who do not assert their own claim, but to let parties take the consequence of their own laches.

The case of Earl of Pomfret *v.* Lord Windsor, see 2 Vez. 483, appears to me to have no relation to the present case; but I observe that Lord Hardwicke, in giving judgment, states this: "It is true that courts of equity do discourage suits for old stale accounts, and very rightly. But every case of that kind must be considered on its circumstances, and ought to be determined by the justice and equity of that particular case, arising from those circumstances." Now the very last dealing which is represented to have taken place with regard to the assets of Lady Brown, was a transaction that took place in the year 1805. The parties to that transaction are all dead; and a suit was now instituted against the representative of Mrs Luther, in order to compel her to account for all that was received by Mrs Luther, and by Elizabeth Bull and Catherine Bull, the present defendant, standing only in the situation of personal representative, and being utterly unable to give any account of what has been done. It appears to me therefore, that it would be a case of the greatest possible hardship on the person who so represents the estate of those three different ladies, to compel her to account, after such a lapse of time. And, when I couple the lapse of time, with the consideration that these three ladies, and those who claim beneficially under them, must have arranged their affairs on the supposition that they were beneficially entitled to this personal estate, it appears to me that I should be doing an act of irreparable injustice, if I was to allow this claim of the plaintiff to succeed.

My opinion is that the plaintiff was not only not sufficiently vigilant, but that he has, by his own act, produced those orders in the cause of Cecil *v.* Morice, which were not only a justification, but imposed a duty on those who represented the personal estate, to deal with it in the way they did: and, on the whole of the case, my opinion is that this bill ought to be dismissed with costs.

## Fry *v.* Lord Sherborne.

3 *Simons*, 243.

By a marriage settlement a term was created for raising portions for daughters, in case the father should die without issue male, such portions to be paid at 21 or marriage, but if the daughters should attain that age, or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained 21 and married, and afterwards died in her father's lifetime: the father died without issue male: Held, nevertheless, that the daughter's representatives were entitled to her portion.

November 20. December 5, 1829.

BY indentures of lease and release, bearing date the 4th and 5th of July 1771, being the settlement executed previously to the marriage of Estcourt Cresswell, Esq. with Anna Maria Wotton, the release being made between Thomas Estcourt Cresswell, Esq. and Anna his wife, and Estcourt Cresswell, the son and heir apparent of Thomas Estcourt Cresswell and Anna his wife, of the first part, Anna Maria Wotton of the second part, Sir Wm. Guise, Bart. and Richard Colchester, Esq. of the third part, and several other persons, after reciting the intended marriage, certain manors and other hereditaments were conveyed unto Sir Wm. Guise and Richard Colchester, their heirs and assigns, (after certain uses in which was included a limitation to Estcourt Cresswell, during his life, and a limitation, after his death, of part of the hereditaments, to Andrew Grote and George Watts, for 500 years, in trust, to raise 10,000*l.* for the portions of younger children, in case there should be issue male of the marriage, all which preceding uses had determined, or become incapable of taking effect,) to the use of the first and other sons of Estcourt Cresswell and his intended wife successively, in tail male, with remainder to the use of Charles Barrow and George Savage, their executors, administrators and assigns, for 1,000 years, upon the trusts thereinafter mentioned, with remainder to Estcourt Cresswell in fee: and it was declared that the premises were limited, to Barrow and Savage, for the term of 1,000 years, upon trust, (in case Estcourt Cresswell should die without issue male of his body, on the body of his intended wife, born in his lifetime, or after his decease, or, there being such issue male, all of them should die without issue male, and before any of them attained the age of 21 years, and there should be issue one or more daughter or daughters of the marriage, at the time of such failure of issue male as aforesaid, or at any time afterwards,) by sale or mortgage of the premises comprised in the term, or by or out of the rents, issues and profits thereof, in the meantime, to raise such sum or sums of money, for the portion or portions of all and every such daughter and daughters, to be applied and disposed of as aftermentioned, (that is to say) if there should be any such daughter or daughters, then the sum of 20,000*l.* should be raised and paid as and for the portion or portions of such daughter or daughters, if more than one, and, if there

should be two or more such daughters, then the said sum of 20,000*l.* should be equally divided between or amongst such daughters, and, if but one, then the whole to be paid to such daughter,* the same portion or portions to be paid, unto such daughter or daughters respectively, at her or their respective age or ages of 21 years, or day or days of her or their respective marriage, which should first happen after the decease of Estcourt Cresswell, and failure of issue male of his body by his intended wife; and if any of the said daughters should attain her or their respective ages of 21 years, or be married in the lifetime of Estcourt Cresswell, then such portion or portions should be paid to such daughter or daughters respectively, within six months after his decease.

And upon further trust, after the decease of Estcourt Cresswell and failure of issue male of the marriage, in the mean time and until such portion or portions of the said daughter or daughters, should become payable as aforesaid, to raise, out of the rents and profits of the premises, such yearly sum and sums of money, for the maintenance and education of such daughter and daughters, as should amount to the interest of the portions thereby for them respectively provided, after the rate of 3*l.* per cent. per annum, the sums for maintenance to be paid to such daughter and daughters respectively, on the days therein mentioned, the first payment thereof to be made upon such of the said days as should first happen after the decease of Estcourt Cresswell and failure of issue male of the marriage.

Provided that, in case any of the daughters should die before her or their portion or portions should become payable, by virtue of the trusts, then the portion or portions of her or them so dying, should go and be paid unto the survivors or survivor of them, to be equally divided between them, share and share alike, when the original portion or portions of such surviving daughter or daughters should become payable in pursuance thereof. Provided also that, if any such sum or sums of money, should, by virtue of the lastmentioned proviso, vest in and devolve upon, any of such child or children, by way of survivorship or accruer as aforesaid, then such sum and sums of money should, from time to time, as the case should happen, be subject and liable to such right, condition and contingency of accruer or survivorship, in favour and for the benefit of the surviving daughter and daughters of the marriage, as was before declared concerning the original portion or portions of any daughter or daughters of the marriage.

Provided also that, in case all the daughters should die before any of their portions should become payable, then the sum or sums of money thereby appointed to be raised, for the portions of such daughter or daughters as aforesaid, or so much thereof as should not then be raised, should not be raised, but should cease for the benefit of the person or persons entitled to the estate and inheritance in the premises, upon the determination of the term of 1,000 years, and then also such sum and sums of money as should be then raised, for or towards such portion or portions, should be paid unto the person or persons next in reversion or remainder expectant upon the determination of the term of 1,000 years. Provided also that no such sale or mortgage as afore-

* This part of the settlement seems to be inaccurately worded. It is, however, correctly copied from the papers in the cause.

said, should be made, until some or one of the portions should become payable under the indenture of release.

Provided also that, in case Estcourt Cresswell should, in his lifetime, give, to his said daughter or daughters, or any of them, any sum or sums of money, for or towards her or their advancement or preferment in marriage or otherwise, or the said daughter or daughters, or any of them, should receive or be entitled to any portion or portions to be raised by virtue of the trusts declared of the term of 500 years, or if, by or after the death of Estcourt Cresswell, there should come unto or descend upon the said daughter or daughters, or any of them, any lands, tenements, or other hereditaments, of or from Estcourt Cresswell, then such sum or sums of money, and the value of such lands, tenements and hereditaments to be sold, should be accounted for and deemed as part of the portions thereby for them provided, unless Estcourt Cresswell should by writing under his hand, declare the contrary.

And it was declared that, Barrow & Savage, should permit such person and persons respectively to whom the next and immediate reversion or remainder of the premises expectant upon the determination of the term of 1,000 years, should, for the time being, belong, by virtue of the limitations therein contained, to take the surplus of the profits of the premises, over and above so much thereof as should be, from time to time, paid for the maintenance and education of the said daughter or daughters respectively, until some or one of the portions should become payable. Provided also that, in case of the failure of issue male of Estcourt Cresswell by his intended wife, there should happen to be no such daughter or daughters, of their two bodies, or, there being any such, all of them should happen to die before any such daughter or daughters should be entitled to her or their portion or portions by virtue of the said indenture, or in case all the trusts of the term of 1,000 years should be fully performed, then the term should cease.

In September 1772, Anna Maria, the wife of Estcourt Cresswell, died: and there was issue of the marriage one child only, Ann Cresswell. In 1794, after Ann Cresswell had attained 21, a family arrangement was made, between her and her father, by which she agreed to accept, from the trustees of the term of 1,000 years, when the 20,000*l.* should become payable, the sum of 10,000*l.* only.

In September 1802, Ann Cresswell intermarried with the plaintiff Thomas Fry. By the settlement previous to their marriage, the 10,000*l.* was assigned, to trustees, for the separate use of Mrs Fry. By an indenture of March 1806, Mrs Fry, in exercise of a power contained in her marriage settlement, appointed the 10,000*l.*, to her husband absolutely. In November 1811, Mrs Fry died without issue. By the settlement previous to the marriage of Mr Fry with Margaret Henrietta Middleton, and dated on the 19th of October 1812, Mr Fry assigned the 10,000*l.* to trustees for the benefit of himself and his intended wife, and their issue. After the death of Anna Maria Cresswell, Estcourt Cresswell married again, and had issue several children. In September 1814, he made a settlement of the estates, comprised in the settlement of 1771, on himself, for life, remainder to his son Richard Estcourt Cresswell for life, with several remainders over, under

which Thomas Estcourt Moreton Corbet Cresswell was the first tenant in tail. In June 1823, Estcourt Cresswell died.

The bill was filed by Mr and Mrs Fry and their children, against R. E. Cresswell the elder, T. E. M. C. Cresswell and other parties, praying that the trusts of the term of 1,000 years might be performed, and that the 10,000*l.* might be raised and paid to the trustees of Mr and Mrs Fry's settlement.

The defendants R. E. Cresswell and T. E. M. C. Cresswell, by their answer, submitted that the portion of 20,000*l.* (which was afterwards reduced to 10,000*l.*) was payable in the event only of some daughter of Estcourt Cresswell and Anna Maria his first wife, surviving E. Cresswell, and there being a failure of issue male of that marriage, and that, as Ann Fry died in the lifetime of E. Cresswell, her father, the term of 1,000 years did not take effect in possession, but that the same, or, at any rate, the trusts declared thereof, became incapable of taking effect; and consequently that the plaintiffs were not entitled to the 10,000*l.*

The cause now came on to be heard.

Mr Horne and Mr Wray, for the plaintiffs:

The question is whether Ann Cresswell, who attained 21 and married, did not acquire a vested interest in the 10,000*l.* notwithstanding she died before that sum was payable. The only person who could dispute her right, was her father, who was entitled to the reversion in fee of the estates, charged with the portions. On the failure of issue male the right of the daughter accrued. The payment of the money was postponed, for the mere purpose of protecting the father's life-estate from the charge. It would be monstrous to put a construction upon this settlement, the effect of which would be that, if the daughter married in her father's lifetime, but did not survive him, she would be deprived of all provision. The settlement contains a clause for the maintainance of the daughters, which has always been a ground for holding portions to be vested. The only rational construction that can be put on the clause in which the trusts of the term are declared, is to read the word "payable" as "vested."*

The Solicitor-General, Mr Pepys, and Mr Ellison, for the defendant Richard Estcourt Cresswell, and the other parties interested in the estates under the settlement of September 1814:

In this case, none of the trusts of the term of 1,000 years arose, as there was no daughter living at the death of Estcourt Cresswell, without issue male. There is nothing in the settlement to show that the portions are to vest at 21 or marriage, or at any time, except the time of payment. All the trusts contemplate the existence of a daughter at the death of the father without issue male. The rule is always to relieve the estate from the portion, unless the child is living at the time

* See Emperor *v.* Rolfe, 1 Ves. 208; Cholmondeley *v.* Meyrick, 3 Bro. C. C. 253; Woodcock *v.* The Duke of Dorset, 3 Bro. C. C. 569; Hope *v.* Lord Clifden, 6 Ves. 499; Schenck *v.* Legh, 9 Ves. 300; Bayard *v.* Smith, 14 Ves. 470; Willis *v.* Willis, 3 Ves. 51; Powis *v.* Burdett, 9 Ves. 428; Howgrave *v.* Cartier, 3 V. & B. 79; King *v.* Hake, 9 Ves. 438.

when it requires the portion. In Schenck *v.* Legh, and the cases of that class, the owner of the inheritance had no interest in the question; but the dispute was between the surviving children and the representatives of a deceased child. The case of Wingrave *v.* Palgrave, 1 P. Wms. 401, is exactly this case. Hotchkin *v.* Humfrey, 2 Madd. 65, and Fitzgerald *v.* Field, 1 Russ. 430, are also decisions in our favour.

Mr Horne in reply said that, in Wingrave *v.* Palgrave, the trusts of the term were not to arise unless the father died without issue male, leaving a daughter; and that, by the proviso, the term was to cease if the father should not have a daughter living at his death; and that, therefore, no one could doubt that the daughter could not be intitled to a portion, unless she was living at the decease of the father.

Mr Wilbraham, Mr Blenman, Mr Hall, and Mr Walcott, appeared for the other parties.

The Vice-Chancellor. The question in this case, is whether, in the events that have happened, the portion that was provided for the daughter, who was the only child of the marriage of Mr and Mrs Cresswell became raisable.

There is no allusion, in the recitals of the settlement of 1771, to the intention of making provision for the issue of the marriage; which I notice, because I observe that, in some of the cases upon this subject, the fact of their being such a recital, has been considered as being, in some degree, material.

The events that happened in this case, were, that the wife died, in September 1772, without issue male, but leaving one daughter; that daughter attained the age of 21, and married in her father's lifetime, and then died; and, at the death of the father, therefore, there was no child of the marriage *in esse;* and the question is whether, inasmuch as the daughter attained 21 and died in the lifetime of her father, she became entitled to the portion which was raisable under the trusts of the term of 1,000 years. The trusts of that term were, in case Estcourt Cresswell should die without issue male of his body, on the body of his intended wife, born in his lifetime, or after his decease, or, there being such issue male, all of them should die without issue male, and before any of them should attain 21, and there should be issue one or more daughter or daughters of the marriage, at the time of such failure of issue male, or at any time afterwards, to raise such sums of money for the portions of every such daughter, to be applied and disposed of as thereinafter mentioned, (that is to say) if there should be any such daughter, then the sum of 20,000*l.* should be raised. Now, upon this first declaration of the trusts of the term, it is observable that the event took place, in which, according to the words which I have read, the sum of 20,000*l.* would be raisable; because the events that were described were, in case the husband should happen to die without issue male of his body born in his lifetime, or after his decease; which was the event that actually happened. The deed goes on to specify another alternative; that there might be issue male, all of whom might happen to die, without issue male, and before any attained the age of 21 years; that event, however, never happened, because there was no issue male.

Then it was provided that if there should be issue one or more

daughter or daughters of the marriage at the time of such failure of issue male; which event happened: and therefore this case is free from the difficulties which have arisen, in several cases, in the course of the last 110 years, in this court: because, in those cases, the persons who were alleged to be the objects of the bounty, or the persons who were to take the portions did not completely answer the description contained in the instruments under which they claimed. I make that observation with reference, particularly, to the case of Woodcock *v.* the Duke of Dorset, 3 Bro. C. C. 569, and other cases which I shall presently notice.

In the case of Woodcock *v.* the Duke of Dorset, the children who were to take were described as those whom Lord John and Lady Frances should leave at the death of the survivor. It appears, from that case, that Lady Thanet, who was one of the two children of Lord John and Lady Frances, survived her father. She then attained the age of 21, and died in the lifetime of her mother: and Lord Thurlow held that the administrator of Lady Thanet, was entitled to the portion: and yet it is obvious that she did not come, completely, within the description. Lord Thurlow there decided upon what he called the honour and truth of the case, and upon certain words which are found, almost as a matter of course, in settlements which direct that portions shall be raised for younger children.

In the case of Hope *v.* Lord Clifden, the trusts were to take effect, in case there should be any child of the marriage living at the decease of the husband, or afterwards born alive, other than such as should be heir male of his body; and the event was that Mary, the daughter under whom the plaintiff claimed, died in the lifetime of her father; and, by reason of that event, she did not strictly answer the description of the persons for whom portions were provided; yet Lord Eldon held, that, upon the purview of the whole settlement, she was entitled to a portion.

There are other cases of a similar kind. The strongest, I think, is that of Powis *v.* Burdett, 9 Ves. 428. There the limitation was to the use of Lord Denbigh for life, and, after his death, in case he should leave one or more daughter or daughters, younger son or sons, to raise 12,000*l.* for their portions, to be paid them at the usual periods. And it was provided that, if all the younger sons and daughters should die before their portions should become payable, then no part of the 12,000*l.* should be raised. There were two children of the marriage, Lord Fielding, who was the eldest son, and Charles John Fielding. The mother died leaving both these children surviving; but Charles John Fielding died in the year 1789, and the question was whether he was entitled to the 12,000*l.*, and, although it is plain that Charles John Fielding did not literally answer the description, yet Lord Eldon held, upon a view of the whole of the settlement, that Charles John Fielding attained a vested interest in his portion.

It is observable that, where the description is only of a loose nature, the court has felt itself at liberty to look at the whole of the settlement, and to put a construction on the words which, in some degree, is different from their literal meaning: but, at the same time, where it is manifest, upon the face of the settlement, that the object of the parties is, that no child shall take except in the event of its actually surviving

both the father and mother, the court has not indulged itself in the liberty of breaking through the express and plain words.

In Hotchkin *v.* Humfrey, 2 Madd. 65, the trusts were, in case Lebbeus Humfrey should leave one or more daughter or daughters, younger son or sons that should be living at the decease of the survivor of him and his intended wife, that then 2,000*l.* should be raised for their portions: and there it was held that the children who did not survive, could not take. The case of Fitzgerald *v.* Field, 1 Russ. 430, was a similar case: it had words very much the same, and met with the same decision.

With respect, however, to the present case, it appears to me that there are quite sufficient words, in the first part of the declaration of the trusts of the term, to show that, in the event that happened, the portion was to be raisable; and that the difficulty arises more upon the subsequent words of the declaration of trust. It is declared that the 20,000*l.* shall be raised and paid amongst the daughters, equally, if more than one, and, if but one, then the whole to be paid to such daughter, the same portion or portions to be paid, unto such daughter or daughters respectively, at her or their respective age or ages of 21 years, or day or days of her or their respective marriage, which shall first happen after the decease of Estcourt Cresswell, and failure of issue male of the marriage; and, if any of the said daughters should attain 21, or be married in the lifetime of Estcourt Cresswell, then such portion or portions should be paid to such daughter or daughters, within six months after the decease of the said Estcourt Cresswell. Now there appears to be some degree of inconsistency between these two clauses: because, in the first instance, it is directed that the portion shall be paid to a daughter attaining the age of 21 years or being married, which shall first happen after the decease of Estcourt Cresswell: and, if that clause had stood alone, it certainly would appear that there was no time of payment except that which should happen after the death of Estcourt Cresswell: but then there comes a clause which declares that, if any daughter or daughters should attain the age of 21 years, or be married, in the lifetime of Estcourt Cresswell, then such portion or portions should be paid, to such daughter or daughters, within six months after his decease. Now it is upon words of that kind that most of the cases in the books have turned.

In the case of Wingrave *v.* Palgrave, 1 P. Wms. 401, (which I believe is the first case on the subject), on the marriage of Augustine Palgrave with Barbara Gascoin, a term was created in order to raise portions: and the trust of it was declared to be, if Augustine Palgrave should die without heir male of his body by his wife, and leaving a daughter or daughters, then such daughter or daughters should have 3,000*l.*, if but one, and, if more, the 3,000*l.* was to go amongst them, and to be payable at 21 or marriage, with a proviso that, if the father should not have any daughter, by his wife, living at his death, then the term should cease. In that case it was held that, in the event that happened of there being only one child, Elizabeth, who attained 21, and married, and survived her mother, but did not survive her father, the portion was not raisable. Lord Cowper founded his decision upon this: that, by the express words of the proviso, the term was made to cease, if the husband should not have a daughter living at his decease.

And, certainly, if the term by means of which the portion is to be raised, has itself ceased, this court has no authority to revive it.

In the case of Emperor *v.* Rolfe, 1 Vez. 208, the term was limited to take effect, in possession, after the mother's death. The trustees were to raise daughters' portions, to grow due and payable at 21 or marriage; and, if any of the daughters should die before their portions became due and payable, then it was directed that their portions should survive. There were two daughters: both attained 21 and married; one died in the mother's lifetime; and it was held that her representatives, and not her surviving sister, were entitled to her portion.

In Willis *v.* Willis, 3 Ves. 51, Lord Roslyn says: "These clauses were framed to obviate the difficulty arising from the determinations that charged the reversion, by permitting interest to be carried on from the age of 21, though there was an estate for life. As soon as these clauses came forward, in Emperor *v.* Rolfe, Lord Hardwicke put a just construction upon them; and he referred the word "payable," to the time in respect of the quality of the child, distinguishing between that and the time when, *ex necessitate*, the money was to be *de facto* raised." In other words, Lord Hardwicke held that, where there were such words as I have read, directing that, if any of the daughters should attain the age of 21 or be married, in their parent's lifetime, then their portions should be paid, those words, "or be payable" "or be due" shall signify "vested." So that the whole construction shall be, that the child shall attain a vested interest, though it die in the lifetime of the father; and yet the portion shall not be payable until after the death of the father; preserving, therefore, the interest of the child in the portion, without throwing upon the estate for life of the father, the necessity of keeping down the interest upon the portion, which was not intended to be payable till after the death of the father.

It was observed, in the course of the argument in this case, that the cases, some of which were mentioned, and others of which were generally alluded to, were cases in which the question before the court was merely a question of survivorship, where there were several children, some of whom would, undoubtedly, be entitled to portions, and the only doubt was whether those who pre-deceased in the lifetime of the parent, should be entitled. That, however, does not seem to be an accurate representation of the cases. Because, in Jeffreys *v.* Reynous, 6 Bro. P. C. 398, it appears that exchequer annuities were settled upon the husband and wife, for their lives, and, after their death, for the children of the marriage, in equal shares, to be assigned and made over, to the children respectively, at their respective ages of 21 years, happening after the death of the survivor of the husband and wife, (almost the very same words as are found in the first part of the clause upon which I am now commenting), and if any of the children should attain 21 during the joint lives of the husband and wife, or in the lifetime of the survivor, then their shares of the annuities were to be paid, assigned and made over to them, within three months after the death of the survivor of the husband and wife, unless they or the survivor of them should direct the shares of any of the children to be paid sooner; with a proviso for survivorship, among the children, if any should die before their shares should be assignable; and there was another clause which provided that, if there should be no child, or, there being such, all of

them should die before their shares should become transferrable as aforesaid, then the trustees should stand possessed of the annuities in trust for the husband and wife, and the survivor of them, and the executors and administrators of such survivor. In that case there was only one child, a son. That son attained 21, but died in the lifetime of his mother, who had survived her husband: and it was first of all determined by the Master of the Rolls, and afterwards by the Lord Chancellor, and, ultimately by the House of Lords, that the only child was entitled to the exchequer annuities. In Powis *v.* Burdett, there was but one child; and yet that child was held entitled. It appears to me, therefore, that I am compelled to hold that, where a portion is provided for a son on attaining 21, or for a daughter on attaining that age or being married, and those events happen in the lifetime of the parent, the child, though it dies in the lifetime of the parent, has acquired an absolute, vested interest in the portion, or, in other words, that the word "payable" means "vested."

There is then a further trust in the same clause. [His honour here read the clauses for maintainance and survivorship.] It is manifest from the use, in this part of the settlement, of the expression "to vest in and devolve upon, &c." that the framers of the deed had not a very accurate notion of the meaning of the term "vest;" because the term is employed as denoting that, in the first instance, if one of the daughters died before the time appointed for payment, her share should go over to and vest in the others; yet, in the same clause, it is provided that that very same thing shall go over again. Then it is provided that, in case all the daughters should die before any of their portions should become payable, the sum or sums of money appointed to be raised for the portions of such daughters or daughter, or so much thereof as should not then be raised, should not be raised, but should cease for the benefit of the person entitled to the inheritance, and that then such sum and sums of money as should be then raised for or towards such portion or portions should be paid to the person next in remainder.

That is a very remarkable clause, because it assumes that, though the daughters may not have arrived at the time when their portions would be payable, yet part of the portions might have been raised: for it directs that the sum which shall be raised for or toward such portion or portions, shall be paid to the person next in remainder. Then it is provided that no sale or mortgage shall be made until some or one of the portions should become payable by virtue of the settlement.

It is quite clear here, that the parties did suppose that there was something in the antecedent part of the declaration of trust, which might make the portions payable in the lifetime of the father; and accordingly there is an express proviso, that no sale or mortgage should be made until some or one of the portions should become payable under the settlement.

Then there is a proviso, that in case Estcourt Cresswell should, in his lifetime, give to his said daughter or daughters, &c. It is therefore clear, that when the parties used the expression, "said daughter or daughters," they alluded to a daughter or daughters who might not survive the father; for, if the only daughters who were contemplated by the settlors were the daughters that should survive their father, there

would have been very little necessity for introducing this proviso in the way in which it is introduced.

[His Honor then read the clause, directing that the persons entitled in remainder expectant on the term of 1,000 years, should receive the surplus profits, and the proviso for the cesser of the term.]

Now, if this proviso were couched in such terms as that, notwithstanding the expression that I have before alluded to, the term had ceased, there would have been an end of the question.

I observe that Lord Eldon, in reasoning the case of Hope *v.* Lord Clifden, takes notice, that the term there continued; that whatever might be the construction put upon the words directing the raising of the portions, yet in the event that happened, there was a legal existing term, by means of which the fund was to be raised, out of which the portions were to be paid.

Here the words are: "Provided that, in case of failure of issue male of E. Cresswell, by the said A. M. Wotton, there should happen to be no such daughter or daughters of their two bodies, (an event which did not happen,) or, there being any such, all of them should happen to die before any such daughter or daughters shall be entitled to her or their portion or portions by virtue of these presents, or in case all and every the trusts hereinbefore declared of and concerning the said term of 1,000 years, shall be fully performed, then the said term shall cease and determine."

My opinion is, upon the previous words, that the event did not happen, namely, of all the daughters dying before any one became entitled to her portion: because, having regard to all the cases, I am bound to say that this lady did not die before she became entitled to her portion. The consequence, therefore, is that the term at law, which was originally a term well created in remainder, still continues; and my opinion is, that under the trusts of this term, she, or rather the plaintiffs who claim under her, are entitled to have the portion of 10,000*l.* raised.

## Sandilands *v.* Innes.

3 *Simons*, 263.

A creditor of a person who died intestate in India, took out letters of administration to the deceased, in that country. He then came to England, and obtained letters of administration from the prerogative court. Afterwards one of the intestate's next of kin procured that administration to be revoked, and administration to be granted to himself. Held, that the Indian administrator is compellable to account to him for assets possessed in India as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties.

November 23, 1829.

IN 1805, Erskine Nimmo died, intestate, at Madras: and in March 1806, William Fairlie, who was then resident at Calcutta, and was a creditor of the deceased, procured letters of administration of the de-

ceased's effects, to be granted to him by the supreme court of judicature at Madras, and the effects at Madras were got in by a mercantile house there, whom Fairlie had employed as his agents for that purpose. Fairlie afterwards returned to England; and in December 1812 took out letters of administration to the deceased from the prerogative court of Canterbury. In 1815 the plaintiff, who was one of the next of kin of the deceased, returned to England from the West Indies, where he had been long resident, and procured the letters of administration which had been granted to Fairlie by the prerogative court, to be revoked, and fresh letters of administration to be granted to himself. He then filed a bill against Fairlie, (to which the other next of kin of the intestate, who were living at Madras, were, in the first instance, made defendants, but their names were afterwards struck out by amendment,) praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by Fairlie, and that Fairlie might be decreed to pay to the plaintiff, as the sole legal personal representative of the intestate, what should be found coming from him on the taking of the account, and might also be directed to deliver to the plaintiff, as such personal representative, such parts of the intestate's effects as were then in his possession or power, and to transfer, to the plaintiff, as such personal representative, a certain sum of Carnatic stock, part of the intestate's estate. After the cause was at issue, Fairlie died: and the plaintiff revived the suit against the defendants Innes & Clark, his executors.

Mr Pepys and Mr Collinson for the plaintiff.

The Solicitor-General and Mr Wakefield for the defendants.

The bill, as it now stands, is filed, by the plaintiff, in the character of personal representative only of the deceased, and not in that character, and as one of the next kin also; and, therefore, he is not entitled to sue for an account of the assets of the deceased, possessed by Fairlie, in India, but only of the assets possessed by that gentleman in this country. The plaintiff could not have compelled Fairlie to account for the assets possessed in India, unless he had filed his bill as one of the next of kin of the deceased, and made the other next of kin parties. Although the court should, in this suit, decree an account to be taken of the assets possessed under the Madras administration, a similar bill may be filed by the other next of kin, and then the defendants will be decreed to render the account a second time.

The Vice-Chancellor said that, if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, make it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India.

## Hanbury *v.* Kirkland.

*3 Simons, 265.*

On a marriage a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to charge securities with consent of the wife. The dividends on the stock being reduced, one of the trustees in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied: the trustee sold the stock and absconded. Held that the co-trustees were liable.

November 26, 1829.

BY an indenture, dated the 1st of June 1818, and made between J. Jones and P. Bartlett, of the first part, Capel Hanbury, Esq. of the second part, Ellen Hanbury, then Ellen Franklin, spinster of the third part, and N. Kirkland, A. George Milne and Charles Kaye, of the fourth part, (being the settlement previous to the marriage of Capel Hanbury with Ellen his wife), it was declared that Kirkland, Mi ne and Kaye should stand possessed of the sums of 7,400*l.* navy 5 per cent. annuities, and 100*l.* three per cent. consolidated annuities, which shortly before had been transferred into their names, upon trust, after the solemnization of the marriage, to suffer those sums of stock to remain in their then state of investment; or, with the joint consent in writing of Mr and Mrs Hanbury during their joint lives, and after the decease of either of them, with the like consent of the survivor, and, after the decease of the survivor, then at the discretion of the trustees for the time being, to sell and dispose of the said sums, or either of them, or any part thereof; and to lay out and invest the moneys to arise by such sale, in the names of the trustees for the time being, in the public funds, or, at interest, upon government or real securities in England or Wales, and from time to time, with such consent in writing, or at such discretion as aforesaid, (as the case might be) to alter, vary and transpose the trust-moneys so to be laid out, and the stocks and securities, in or upon which the same should, for the time being, be laid out, for or into other stocks or securities of the like nature; and it was declared that, subject and without prejudice to the several trusts aforesaid, the trustees should stand possessed of the trust-moneys, stocks and securities, upon trust, during the joint lives of Mr and Mrs Hanbury, to pay, the interest and dividends thereof, to Mrs Hanbury, for her separate use; and, after the decease of either of them, upon trust for the survivor of them, for life; and, after the decease of the survivor, upon trust for the child or children of the marriage. And the trustees were empowered, during the joint lives of Mr and Mrs Hanbury, upon their application, to advance and lend, to Mr Hanbury, any part of the trust-moneys not exceeding 1,500*l.* upon the security of his bond. And it was declared that the trustees

should be charged for such moneys only as they respectively should actually receive by virtue of the trusts, notwithstanding their giving or signing, or joining in giving or signing any receipt or receipts, for the sake of conformity; and that any one or more of them should not be answerable or accountable for the other or others of them, or for involuntary losses.

The settlement was prepared by Messrs Kaye, Freshfield & Kaye, who were Mrs Hanbury's solicitors: and Mr Charles Kaye, had become one of the trustees, at the request of the friends of Mrs Hanbury; and after the marriage he received, for her, the dividends on the stock, and he was the person in whom she and her husband principally confided and communicated with, in all matters relating to the trust-property.

Soon after the marriage, the 1,500*l.* was raised under the power in the deed, and lent to Mr Hanbury. The whole of the 100*l.* three per cents. and part of the 7,400*l.* were sold for that purpose; and in 1822 the remainder of that sum was converted, by act of parliament, into 6,359*l.* 8*s.* 7*d.* new 4 per cents.

In consequence of the reduction of the income of the trust-property caused by this conversion, it was arranged between Mr Hanbury and Mr C. Kaye that the stock should be sold, and the money laid out on mortgage: and, on the 8th of July 1822, Mr Hanbury wrote to Mr Milne as follows: "Mr Kaye has, in the kindest manner, undertaken to lend out the trust-money, on mortgage, at 5 per cent. As this will be a very great object for us to accomplish, I shall take it exceedingly kind if you will second his ideas on the subject. Mrs Hanbury unites with me, &c." On the 2d of August 1822, Mr C. Kaye wrote a note, to Mr Kirkland, stating that he then had an opportunity of investing the trust-property upon good landed security, at 5 per cent.; and that, as the settlement empowered the trustees to lend the money on such security, he had had a power of attorney taken out, from Mr Kirkland and Mr Milne, to himself, so that the transfer might be made on the security being completed, which would be done by Monday or Tuesday then next: and Mr Kaye then requested Mr Kirkland to execute and return the power, if Mr Kirkland concurred, with him and Mr Milne, in the proposed arrangement. Mr Kirkland, accordingly, executed the power of attorney, and returned it to Mr Kaye. On the 6th of August 1822, Mr Kaye sold out the trust-stock, and applied the proceeds to his own use, but he continued (until some time in the year 1825, when he absconded), to pay to Mr and Mrs Hanbury the amount of the dividends, as if the stock had remained unsold. In 1823, Mr Hanbury wrote, to Mr Kaye, to inquire if he had procured, or was likely to procure an eligible mortgage for the trust-fund: to which Mr Kaye replied that he had failed in obtaining the mortgage that he had had in view, but was still in hopes to invest the trust-fund on another security equally desirable.

The bill was filed by Mr and Mrs Hanbury and their infant child, against Mr Kirkland, Mr Milne and Mr Kaye, (who was out of the jurisdiction of the court). It prayed that the execution of the power of attorney and the sale of the stock, might be declared a breach of trust by the defendants, and that they might be decreed to replace the stock.

[Hanbury *v.* Kirkland.]

Mr Knight and Mr Wakefield, for the plaintiffs:

Mr and Mrs Hanbury, in consequence of the reduction in their income that took place in 1822, expressed a wish to have the stock sold, and the proceeds laid out on a mortgage. There ended their privity to the transaction. In 1822 Mr Kaye transmitted a power of attorney, to his co-trustees, to enable him to sell out the stock: they executed it and sent it to Mr Kaye. He, without a mortgage being obtained, sold out the stock, and pocketed the money. This his co-trustees enabled him to do; and they, therefore, have been guilty of a breach of trust. Chambers *v.* Minchin, 7 Ves. 186, Lord Shipbrook *v.* Hinchinbrook, 11 Ves. 252, and 16 Ves. 477.

The Solicitor-General and Mr Beames, for the defendant, Kirkland:

In this case the misfortune originated in the conduct of Hanbury himself. He continued to receive the dividends without making any communication either to Mr Kirkland, or to Mr Milne. The execution of the power of attorney was justified and required by the settlement. The letter of the 8th of July 1822, shows that the husband and wife required the securities to be changed. Is then a trustee to be made responsible because an act which he has lawfully done has led to a loss? Massey *v.* Banner, 1 J. & W. 241. There is no case in the books that comes up to this. There is no case in which a trustee has been held to have committed a breach of trust, except where an act has been improperly done by him. If all the trustees had gone to the bank, and sold out the stock, one of them only could have received the money. There must be some interval between the receipt and the payment of the money. If Kaye had received it for the purpose of paying it to the mortgagor, his co-trustees would have been discharged. He was the solicitor of the parties, as well as one of their trustees. The cases that have been cited for the plaintiffs, relate to executors. Now there is this distinction between executors and trustees: each executor may do an act; and if they join, they do so without occasion: but trustees must all join in the act. There has been no wilful default on the part of the defendants, and therefore they are protected by the clause of indemnity, in the settlement. There was no breach of trust, until after the stock had been sold.

Mr Pepys and Mr Walker, for the defendant, Milne:

The settlement authorizes the trustees to change the securities with the consent of Mr and Mrs Hanbury. Mr Kaye was their solicitor and agent: and therefore in dealing with him, we were, in fact, dealing with the principals. The note from Mr Kaye to Mr Kirkland, and the letter, of the 8th of July 1822, from Mr Hanbury to Mr Milne, were a sufficient consent in writing within the terms of the settlement. That letter clearly manifests Mrs Hanbury's concurrence in the proposed change of securities. Any writing emanating from the parties, would have been sufficient to authorize the trustees to change the funds: it was not required that the writing should be under the hands of the husband and wife. Bacon *v.* Bacon, 5 Ves. 331. Mr Kaye, their agent, informed the trustees that a specific security was in contemplation, and that it would be completed by the Monday or Tuesday following: and, as the trustees had an authority in writing to vary the funds, they are discharged from all liability. Mr Kaye had received

the dividends on the stock and paid them to the plaintiffs; and the trustees were therefore justified in supposing that he received the interest on the mortgage: and consequently there was nothing to lead to the discovery that the money had not been laid out on the mortgage. Confidence must be placed in some one. Here the party trusted was the solicitor to the trustees. Because they trusted him, can they be said to have been guilty of culpable negligence; and unless that is made out these defendants can not be made responsible. If a fund is placed in the control of one of the Trustees, yet if that act is done in the proper execution of the trust, the party is not liable: *Ex parte* Griffin, 2 Glyn & Jam. 114. In Chambers *v.* Minchin, a decree had been made for the administration of the assets, and the sale of the stock was not required for the purposes of the trust. In Lord Shipbrook *v.* Lord Hinchinbrook the co-executor had a large balance in his hands, which was amply sufficient for all the purposes of the trust. In Brice *v.* Stokes, 11 Ves. 319, a trustee was charged, because, after the money had been received by his co-trustee, he permitted it to remain in his hands in a long course of misapplication.

The Vice-Chancellor. The trustees in this case have been guilty of most culpable negligence.

In July 1822, Mr Hanbury writes a letter to Mr Milne, in which he says: "Mr Kaye has in the kindest manner, &c." Upon the receipt of this letter, it was the duty of the trustees to inquire what was the intended security, and who was to be the mortgagor. But they did not bestow a thought upon the subject. Then comes the note, of the 2d of August 1822, from Kaye to Kirkland, in which he says that he has an opportunity of investing the trust-stock upon good landed security, and requests Mr Kirkland to execute the power of attorney, to enable him to make the transfer, on the security being completed, which might be done by the Monday or Tuesday following: and the trustees, without further inquiry, without exercising a single act of discretion, execute the power of attorney. It appears that Mr and Mrs Hanbury never could have known that the sale had taken place, because they continued to receive the dividends as before.

If this case is to be decided by the rule laid down in Brice *v.* Stokes, that rule would condemn the trustees: for they have taken no care of the property.

This case is unlike Bacon *v.* Bacon: for there the executor to whom the application was made, knew that there were debts owing to persons living in Kirby's neighbourhood: that, therefore, was a good *substratum* of fact on which he might exercise his discretion. In *ex parte* Griffin, the assignee was justified in what he did, by the necessity of the case. Here there is no substratum of fact upon which these trustees can rely. They took for granted the representation made to them by Kaye, who was not their solicitor, but was the solicitor of Mrs Hanbury.

I am, therefore, of opinion, that the trustees have been guilty of most culpable negligence; and it is my duty to decree that they do reinvest the stock, and account for the dividends since the last payment, and pay the costs of the suit.

## Wood *v.* Beadell.

3 *Simons*, 273.

An injunction was prayed for in the prayer of the bill, but was omitted in the prayer of process, and, on that account, a motion for an injunction was refused; but leave was given to amend. The bill was accordingly amended, and on the motion being renewed, it was objected that the application could not be repeated, until the time for answering the amended bill had expired, but the objection was over-ruled.

November 10, 1829.

AN injunction was asked for in the prayer of the bill, but not in the prayer of process; and, by reason of that omission, an application for an injunction, made on the merits confessed in the answer, had been refused; but the plaintiff had leave to amend, for the purpose of supplying the omission. The bill was amended accordingly; and, shortly afterwards, the motion was renewed.

Mr Pepys and Mr Wood appeared in support of the motion.

Mr Knight and Mr Pattison opposed it, and said that, as the bill had been amended, the plaintiff was not entitled, according to the practice of the court, to move for an injunction, until the time for answering the amended bill had expired: that, if the court was bound, in this case, to inquire into the materiality or immateriality of the amendment, the same duty would be imposed upon it, in every case similarly circumstanced: but that, if the immateriality of the amendment was to be taken into consideration, none could be more important than that which converted a bill not praying an injunction, into a bill which did pray for that writ. Norris *v.* Kennedy, 11 Ves. 565; James *v.* Downes, 18 Ves. 522; Vipan *v.* Mortlock, 2 Mer. 476; Savory *v.* Dyer, Amb. 70.

The Vice-Chancellor said, that this case was distinguishable from the cases that had been cited; because the injunction was prayed for in the original bill, and the only alteration that had been made in it, was the insertion of a prayer for that writ in the prayer of process: and that, therefore, he should hear the motion on the merits.

## Allen *v.* Willes.

3 *Simons*, 274.

DEFENDANT moved to dismiss the bill for want of prosecution. Plaintiff undertook to speed. There was time sufficient to file a replication on the same day: but none was filed till the next day: held that the defendant was entitled to draw up the order of dismissal.

December 10, 1829.

## Lovell *v.* Knight.

3 *Simons*, 275.

A married woman having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gives to her husband the whole of her property both real and personal, and whatsoever she might possess at her decease: held not to be an execution of the power.

December 16, 18, 1829.

BY an indenture dated the 29th of August, 1825, and made between Mary Jersey Lovell, then Mary Sadler, spinster, since deceased, of the first part, the plaintiff, Nicholas Jersey Lovell, of the second part, and the defendants, William Knight and John Till Adam and Thomas Jordan, since deceased, of the third part, (being the settlement made previously to the marriage between the plaintiff and Mary Sadler) she assigned, to Knight, Adam and Jordan, their executors, administrators and assigns, certain pieces of ground, messuages, tenements and buildings situate in the city of Bristol and the suburbs thereof, and then vested in her for the residue of several long terms of years. And it was declared that, after the marriage, the trustees should stand possessed of the premises so assigned, and also of 2,000*l.* three per cent. consolidated bank annuities, which had been transferred by Mrs Lovell into the names of the trustees, in trust, for her separate use, and, after her decease, upon trust, during the life of the plaintiff, to pay the rents, dividends and income thereof to him; and, after the decease of the survivor, in trust for the issue of the marriage, at the usual periods, and in default of such issue, and if Mrs Lovell should survive her husband, then in trust for the executors, administrators and assigns of Mrs Lovell, as part of her personal estate; but if she should depart this life in his lifetime, then upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos and declarations as she, notwithstanding her coverture, by her last will and testament, in writing, or any writing in the nature of a will, or any codicil thereto, to be by her signed and published in the presence of and attested by two or more credible witnesses, should, from time to time, direct and appoint, and in default of such direction or appointment, in trust for her next of kin.

Mrs Lovell made her will, dated the 13th of June, 1826, which was signed and published by her in the presence of and attested by three witnesses; and was in the words following: "This is the last will and testament of me, Mary Jersey Lovell, wife of Nicholas Jersey Lovell, surgeon. I give and bequeath, to my dearest husband, Nicholas Jersey Lovell, the whole of my property, both real and personal, and whatsoever I may possess at the time of my decease, the whole to be given up, immediately, to my husband, his heirs, executors, administrators and assigns, to and for his and their own use absolutely: and I appoint my dearest husband as his own executor of this my last will."

Mrs Lovell died in July, 1826. The only issue of the marriage was

a daughter, who died the day after her birth; and therefore did not become entitled to a vested interest under the settlement.

The bill was filed by Mr Lovell, against the surviving trustees of the settlement and some of Mrs Lovell's next of kin: and it prayed that the plaintiff might be declared beneficially entitled to the leasehold premises and bank annuities for his absolute use, either as an appointee named in the will, or as the husband and personal representative of Mrs Lovell; and that, if necessary, the will might be declared to be a valid execution of the general power of appointment by will, given and reserved to her by the settlement, and that the surviving trustees might be decreed to transfer and assign the leasehold premises and bank annuities to the plaintiff, for his absolute use.

The only property liable to be affected by the will, consisted of the leasehold premises and funds comprised in the settlement, and of the sum of 112*l.* 18*s.* 9*d.* or thereabouts, which, at the time of Mrs Lovell's decease, was in the hands of, or due and owing to the trustees of the settlement, on account of the rents and dividends of the property comprised therein, but in trust, nevertheless, for the separate use of Mrs Lovell: which sum was paid to the plaintiff, but was not sufficient to pay the debts due, from Mrs Lovell, on account of her separate estate at the time of her decease: which debts he had since paid and discharged.

The Solicitor-General and Mr Knight, for the plaintiff.

The testatrix, being a married woman, could have no power of disposition, except under the settlement, and therefore it is clear that, when she made her will, she intended to exercise the power given to her by the settlement. That instrument was made a short time only before the will. If a testator, having leasehold estates only, devises "his freehold estates," the leaseholds will pass. This lady clearly intended to dispose of the property which was subject to the power; and, therefore, although she has made a mistake in the description of the property, the will must be held to be an execution of the power. Standen *v.* Standen, 2 Ves. jun. 589, and 6 Bro. P. C. 193; Wallop *v.* Lord Portsmouth.*

Mr Rose, Mr Kindersley and Mr Haldane, for the defendants, the next of kin of Mrs Lovell.

The courts never hold a will to be an execution of a power, unless it either refers to the power, or to the property expressly, or some part of it would be inoperative unless it were held to be an execution of the power. Nothing can be more general than the bequest is in this case. Although the testatrix was a *feme coverte*, yet she might have had other property settled to her separate use. She had no real estate, and she had personal property which was not subject to the power, namely, the 112*l.* 18*s.* 9*d.* Jones *v.* Curry, 1 Swanst. 66; Webb *v.* Honnor, 1 Jac. & Walk. 352; Jones *v.* Tucker, 2 Mer. 533; Doe *v.* Roake, 2 Bing. 497. The will refers to all the property that the testatrix might be possessed of at her death, and, therefore, it relates to all the property

* Sugden, Pow. 5th edit. Appendix No. 11, p. 762. See also Walker *v.* Mackie, 4 Russ. 76, and Grant *v.* Lynam, ibid. 292.

that the testatrix might afterwards acquire; Hoste *v.* Blackman, Madd. & Geld. 190.

The Solicitor-General, in reply, said that the will was not a disposition of savings, but of capital, and he referred to Forbes *v.* Ball, 3 Mer. 437; and added that the case of Doe *v.* Roake had been overruled, both in the king's bench and house of lords, 5 B. & C. 720; and 6 Bing. 475.

The Vice-Chancellor. In this case, the question before me is, whether, by the will of Mrs Jersey Lovell, her interest in the property which she had a power of appointing by virtue of her marriage settlement, passed. By the settlement, certain leaseholds for terms of years, were assigned, to trustees, in trust for her separate use, and then in trust for her children; and, in default of children, she had a general power of appointment, which was to be exercised by a will, or any codicil thereto, to be by her signed and published in the presence of, and attested by two or more credible witnesses. The instrument which she made was in these words: "This is the last will and testament of me Mary Lovell," (describing herself as the wife of Nicholas Jersey Lovell.) "The whole of my property, &c. &c." And that will was signed by her and attested by three witnesses. The question, then is, whether, upon this instrument, I am authorized to hold that the lady has executed her power of appointing, as to the leaseholds for years.

It was argued that I was authorized to come to that decision, by the authority of Standen *v.* Standen, and Wallop *v.* Lord Portsmouth. There the power extended to appoint money which should arise from the sale of real estate, which real estate had never been sold, but remained to be, and was enjoyed as real estate: and it was decided that the words "real estate" used by the persons having the power, should be held to refer to that which was *de facto* real estate, although, in the contemplation of a court of equity, it was substantially personal estate: and it was said that the decisions in those two cases bear upon the present case; and that the testatrix having used the expression "real and personal property," the court is at liberty to hold that, by real property, she meant, not that which was, in fact, real, according to the general meaning of the term, but that which savoured of the reality: in other words, that real estate, as opposed to personal property, might be held to mean chattels real.

Now it always has appeared to me that the two cases to which I have referred, have gone to the very limit of the law, by giving to the words "real estate" that meaning which, under the circumstances of the property in those two cases, the terms would not ordinarily bear. But I am asked to go much further in this case, and to decide that where a party evidently means to give all her property, and has described it as both real and personal, I am, under the term "real," as opposed to the word "personal," not to hold that that which is real shall pass, but that which is not real shall pass. It appears to me that that would be doing a greater violence to the words, than was done even in the two cases which I have mentioned.

The question, as it appears to me, is whether I can take this testamentary instrument to be any thing else than a general will, by the tes-

tatrix, meaning to dispose of all her property in general terms. Here there is no specific enumeration of the articles of property intended to be disposed of, but she affects to give, "The whole of my property, both real and personal, and whatsoever I may possess at the time of my decease."

Now I do not think that if this person had intended to dispose of all her property, more comprehensive and general terms could have been selected than are here used: and I apprehend it to be perfectly settled that, wherever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property. In the case of Jones *v.* Curry, the Master of the Rolls, in giving judgment, says: "This will contains no words which will be without operation unless referred to the power: on the contrary, the testatrix uses terms of generality: 'all my estate and effects of whatever denomination.' That clause would embrace all her real and personal property, but would it go beyond that?" In the case of Webb *v.* Honnor, the party having a power to appoint a certain portion of another person's estate, which was directed to be laid out in the funds, made his will, and by that will, gave in these words: "And as to all and singular the whole of my personal estate, consisting of money invested in any of the public funds, household furniture, plate, money, watches, trade, and all and the whole of every such property, as I may be in possession of, or in anywise entitled unto, at the time of my decease, I do hereby give and dispose, and bequeath unto my beloved wife Margaret Clark." The Master of the Rolls, in giving judgment in that case, says: "In this instrument, there is nothing to show that the testator meant to dispose of anything but his own property. Every part of it is satisfied by giving all that he was possessed of. He speaks of his personal estate, and every word he has used ties it up to the property that then belonged to himself, or that he might, before his death, become entitled to." And the judgment was, that that will was not an execution of the power. Now, in that will, there certainly were no terms of reference to money in the funds. In the will before me there is nothing which, in terms, does refer to leasehold estate except the very general expression "personal property."

The counsel for the plaintiff did not attempt to argue that, by the terms "personal property" the leasehold estates would pass, but that the leasehold interest could pass by the words "real property." My opinion however, is that that is totally untenable, and the consequence is that I must declare that this will is not an execution of the power.

## Bradshaw *v.* Bradshaw.

3 *Simons*, 285.

A. was served with a *Subpœna duces tecum* to produce a deed in his possession, which was to be proved by the subscribing witness, but he refused; ordered that he should produce the deed at his own expense; that the witness should attend at his expense, and that he should pay all the other expenses caused by his refusal.

December 10, 1829.

A COMMISSION having issued, in this cause, for the examination of witnesses, one Higgin, who had in his possession certain indentures of lease and release, which the plaintiff proposed to prove, was served with a *subpœna duces tecum*, commanding him to produce those indentures before the commissioners. Higgin and the subscribing witness attended before the commissioners; the former, however, although he had been paid his expenses, refused to produce the deeds, but did not assign any sufficient reason for such refusal.

Upon a motion, for the plaintiff, made by Mr Pepys and Mr Walker, and which was opposed by Mr Spence and Mr Sharpe, on the behalf of Higgin, the Vice-Chancellor said, that the sole question was, whether a sufficient reason had been assigned for the nonproduction of the deeds: that no sufficient reason had been assigned, and that, therefore, he should order that Higgin should attend and produce the deeds at his own expense, before the commissioners named in the commission issued, or to be issued, in the cause, for the examination of witnesses: that the subscribing witness also should attend, at Higgin's expense; and that Higgin should pay the costs of the order for extending the commission which was then in force, and of obtaining a renewed commission, as might be necessary; and also the costs of the adjourned meeting of the commissioners, and of any other meeting that might be necessary for the above purposes, and also the costs of the motion and incident thereto.*

The case of Brassington *v.* Brassington, 1 Sim. & Stu. 455, was cited for the plaintiff, and Corsen *v.* Dubois, Holt's N. P. C. 239, for Higgin.

*A motion to discharge this order was refused by Lord Brougham, C. See 1 Russ. and Mylne, 358.

## Tunstall *v.* Trappes. Tunstall *v.* Tasburgh. Rawson *v.* Tasburgh.

3 *Simons*, 286.

Where a judgment is entered up against the owner of lands of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment.

A judgment-creditor is entitled to interest on his debt, where the warrant of attorney authorizes the judgment to be entered up for double the amount of the sum actually due.

When an estate is sold under a decree of the court for payment of debts, a judgment-creditor will be entitled to be paid out of the whole produce of the estate, and not out of a moiety only.

Where an estate is settled to the usual uses to bar dower, and then a judgment is entered up against the owner of the estate, and before execution is taken out the owner of the estate appoints it to a purchaser, the judgment-creditor's lien is defeated.

Notice to a solicitor is actual notice to the client.

Notwithstanding the West Riding Register Act directs that no judgments shall effect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it.

Where a warrant of attorney authorises a judgment to be entered up for double the sum actually due, and the judgment is entered up accordingly, interest will be allowed on the debt.

A claim under a lost deed allowed on the production of an unauthenticated copy of it, coupled with its being recited and recognized in other deeds and instruments, and its being memorialized in the register for the west riding of Yorkshire, where the lands alleged to be comprised in the lost deed, were situate, and the long acquiescence of parties interested in disputing the claim.

By a marriage settlement a portion to which the wife was entitled was assigned, in trust, for her separate use during the coverture, and in case she should die in her husband's lifetime, then in trust for him during his life, and after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, and in default of such issue, in trust for such persons as the wife should by deed or will appoint: the wife survived the husband: held, that she was entitled to the interest of the portion for her life.

December 11, 12, 15, 1829. March 15, 1830.

FRANCIS TRAPPES was a tenant for life of an estate, situate in the West Riding of Yorkshire, called the Nidd estate, with remainder to Francis Michael Trappes, his eldest son in tail male, and by an indenture of bargain and sale, dated the 19th of May 1787, and registered at Wakefield on the 2d of August following, and by a recovery suffered in Michaelmas term 1787, the estate was conveyed by them to the use of John Hardcastle, for the term of 500 years, for raising 500*l.* for F. M. Trappes, and subject thereto, to the use of F. Trappes, for life, with remainder to trustees to preserve, &c., with remainder to F.

[Tunstall *v.* Trappes.]

M. Trappes, for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of F. M. Trappes, in tail male: and F. Trappes was empowered, without prejudice to the term of 500 years, to charge, the estate, with 5,000*l.*, for the benefit of his younger children; and F. M. Trappes was empowered to charge the estate with a jointure of 150*l.* per annum for any wife he might marry, and with 3,000*l.* for portions for his younger children: and a joint power to revoke the uses of the deed, and to appoint new uses, was given to F. Trappes and F. M. Trappes.

By indenture of the 28th of June 1787, and registered at Wakefield on the 13th of November following, the term of 500 years was assigned, to Elizabeth Drake, for securing to her the repayment of 500*l.* advanced to F. M. Trappes.

F. M. Trappes, by the settlement on his marriage, dated the 3d of December 1788, and registered on the 15th of September 1789, in exercise of the power given to him by the deed of May 1787, demised the estate to two trustees, for 1,500 years, for raising 3,000*l.* for his younger children. In February 1791, Francis Trappes charged the estate with part of the 5,000*l.* for one of his younger children.

By indenture of bargain and sale, dated the 20th of December 1794, and registered on the 30th of the same month, F. Trappes and F. M. Trappes revoked the uses of the deed of May 1787, except as to the powers of jointuring and charging, and, subject to those powers, appointed the estate to John Masterman, for 1,000 years, for securing the repayment of 3,000*l.* advanced by him to F. M. Trappes, and, subject thereto, to the uses and subject to the powers of the deed of May 1787.

Francis Trappes died on the 14th August 1803, having, by a deed, of the 7th of July 1795, and by his will, charged the estate with the remainder of the 5,000*l.*, for the portions of his other younger children.

Between the execution of the indenture of the 20th of December 1794, and of the next mentioned indentures, F. M. Trappes, granted several annuities payable out of the rents of the Nidd estate, and raised sums of money by mortgage of that estate; and, for security such annuities and sums, the estate was conveyed, to divers persons, for terms of years determinable with the life of F. M. Trappes, and otherwise.

By indentures of lease and release of the 30th and 31st of May 1811, and registered on the 29th of July following, and by a recovery suffered in Trinity term of the same year, the estate was conveyed by F. M. Trappes and Francis Trappes his eldest son, and by certain other parties, to the use of James Fiddes and Catherine Galbreath, for the term of 1,000 years, for securing 2,000*l.* and interest, which had been advanced to F. M. Trappes, and, subject thereto, to the use of such persons as F. M. Trappes, should by deed or writing appoint, and, in default thereof, to the use of F. M. Trappes for life, with remainder to a trustee during the life of F. M. Trappes, with remainder to F. M. Trappes in fee.

In December 1811, the 2,000*l.* and interest were paid to James Fiddes and Catherine Galbreath, and the term of 1,000 years was thereupon assigned, to George Almon Hill, in trust to attend the uses of the release of the 31st of May 1811.

[Tunstall *v.* Trappes.]

By an indenture of the 16th of July 1811, F. M. Trappes in exercise of the power reserved to him by the release of the 31st of May 1811, appointed the estate to the use that John Davis might receive thereout an annuity of 180*l.*, and, subject thereto, to the use of R. Withy in fee; upon trust, in case the annuity should be in arrear for six months, to sell the premises, and, out of the proceeds, to purchase, for Davis, a government annuity to the same amount, and to pay over the surplus, after discharging the existing incumbrances on the lands sold, to F. M. Trappes; provided that, if F. M. Trappes, his heirs, executors or administrators, should be desirous of re-purchasing the annuity, and should pay a certain sum of money, to Davis, his executors, administrators or assigns, then the annuity should cease, and Davis should, at the costs and charges of Trappes, his heirs or assigns, do all lawful acts for extinguishing the annuity, and re-conveying the premises to Trappes, his heirs or assigns.

By indentures of lease and release of the 4th and 5th of February 1814, F. M. Trappes mortgaged the estate to John Boulcott, in fee, to secure 6,207*l.* 2*s.* 10*d.* and interest; and it was declared that G. A. Hill should stand possessed of the term of 1,000 years, vested in him by the indenture of the 13th of December 1811, in trust for better securing the payment of the lastmentioned sum and interest, and, subject thereto, to attend the inheritance.

In the begining of 1814, Richard Cranmer agreed to lend to F. M. Trappes 18,000*l.* reduced annuities, in order to enable Trappes to clear the estate from the incumbrances thereon, (so far as it was practicable), except the portions secured to the children of Francis Trappes the grandfather, and of F. M. Trappes; and, accordingly, divers parts of the bank annuities were sold, and the produce applied by Cranmer, with the concurrence and at the request of F. M. Trappes, in the discharge of several of the incumbrances as after mentioned.

By indentures of lease and release of the 30th June and 1st of July 1814, and registered on the 16th of September following, the annnuity of 180*l.* granted to John Davis, was, in consideration of the payment, by Cranmer, of the amount of the arrears and consideration money for the same, merged and extinguished, and the premises charged therewith were conveyed, by Whity, unto and to the use of Cranmer, his heirs and assigns, "upon trust for securing to him, his executors and administrators, certain bank reduced three per cent. annuities, and the interest thereof, according to the proviso to be contained in a certain indenture of mortgage, intended to be forthwith executed by the said F. M. Trappes, unto the said R. Cranmer, for securing the bank annuities lent and proposed and intended to be lent by the latter to the former."

By an indenture of the 8th of July 1814, the term of 500 years, created by the indenture of 19th of May 1787, was, in consideration of the 500*l.* thereby secured being then paid by Cranmer, assigned to George Pocock, in trust for better securing to Cranmer the re-transfer of the bank annuities.

By an indenture of the 20th of July, 1814, and registered on 24th October following, one third part of an annuity of 230*l.*, which M. F. Trappes had granted to James Slade, and of a term of 99 years, created by a deed of the 15th May 1809, for securing the same, were, in consi-

deration of 1,000*l.* paid by Cranmer, in part discharge of the arrears and consideration money of that annuity, assigned to G. Pocock, in trust for Cranmer, for further securing the bank annuities; and, by another indenture dated the 22d of August 1814, and registered on the same day as the last-mentioned deed, in consideration of the further sum of 1,000*l.*, paid by Cranmer, on further account of the consideration money and arrears of the last-mentioned annuity, and also in consideration of the mortgage, which was afterwards granted for the remainder of the consideration money, and the arrears of the annuity, the other two-thirds of the annuity, and of the term of 99 years were assigned to Pocock, in trust, for Cranmer, as aforesaid; and by an indenture of the 4th of August 1814, and registered on the 22d of September following, the term of 1,000 years created by the indenture of 20th of December 1794, was in consideration of the 3,000*l.* thereby secured being then paid, by Cranmer, to Masterman, assigned to the defendant John Innes Pocock, in trust for Cranmer, as aforesaid.

By these means Cranmer became (as it was stated in the master's report hereafter mentioned), seized of the legal fee of the estate, as a security for the bank annuities, to the extent of the sum paid in discharge of the annuity of 180*l.* subject to the prior incumbrances on the estate, and entitled to the benefit of the terms of 500 years, 1,000 years, and 99 years so assigned in trust for him, to the extent of the several sums paid him as the considerations for such assignments. In order to enable F. M. Trappes to secure the 18,000*l.* bank annuities, to Cranmer, Boulcott consented to convey the premises comprised in his mortgage of February 1814, to F. M. Trappes, discharged of such mortgage, and to accept of a mortgage, of a certain portion of the estate, as a security for the principal and interest due to him: and, accordingly, those premises were, by indentures of lease and release, dated the 25th and 26th of August 1814, and registered on the 11th of August 1817, conveyed to the defendant Wm. Witham, in fee, in trust for F. M. Trappes, free from the mortgage for securing the 6,207*l.* 2*s.* 10*d.*: and the term of 1,000 years, vested in G. A. Hill, was assigned, by him, to the defendant G. Pocock, upon trust, as to the hereditaments to be comprised in the proposed mortgage, for better securing the 6,207*l.* 2*s.* 10*d.* to Boulcott, and, as to the remaining hereditaments, for better securing the bank annuities to Cranmer.

By an indenture of the 26th of August 1814, after reciting the last stated indenture, F. M. Trappes and W. Witham appointed and demised, a certain portion of the Nidd estate, to Boulcott, for 600 years, subject to redemption on payment of the mortgage money and interest.

By indentures of lease and release, dated the 26th and 27th of August 1814, and registered on the 22d of September following, the release being made between F. M. Trappes, of the first part, Cranmer of the second part, and Witham of the third part, after reciting the indentures of lease and release of the 30th and 31st of May 1811, and the recovery suffered in pursuance thereof, the appointment of the 16th of July 1811, that F. M. Trappes had agreed, with Cranmer, for the loan of 18,000*l.* reduced annuities, to enable him to pay off the mortgages and annuities on the Nidd estate, so far as the fund to be lent would extend to pay, and also reciting the lease and release of the 30th June

and 1st of July 1814, "and that Cranmer had sold the 18,000*l.* bank annuities, and had applied the produce thereof, amounting to the sum of 12,326*l.* 15*s.* 8*d.* in discharge of some of the incumbrances upon the said hereditaments and premises, and otherwise on account of the said defendant F. M. Trappes, in manner therein particularly mentioned* :" Trappes granted, released and confirmed, the mansion house and certain parts of the Nidd estate, to Cranmer in fee, subject to redemption on re-transfer of the bank annuities, and payment of the dividends which would have accrued if the stock had remained in Cranmer's name. In October, November and December 1814, two of the annuities and a mortgage, which were existing charges on the Nidd estate, at the date of the last-mentioned indentures, were redeemed out of the produce of the 18,000*l.* bank annuities, and the terms by which those annuities and the mortgage money were secured, were merged; and the deeds by which those charges were created and the assignments thereof, and also the other securities hereinbefore mentioned to have been assigned to or in trust for Cranmer, were delivered to him or his solicitors, and continued in their possession until the same were, together with the other title-deeds relating to the estate, in their possession, deposited in the Master's office, under an order of the court.

The Nidd estate, and also another estate called Susacres, (which F. M. Trappes had purchased in the year 1812) were, by indentures of lease and release of the 19th and 20th of June 1816, conveyed, by F. M. Trappes, to Michael Ann Tasburgh, Simon Thomas Scroope, and Charles Venner, in trust, to sell, and to stand possessed of the produce, in trust, to pay off the incumbrances on the estates.

The trustees having delayed to proceed to a sale, the bill, in the original cause, was filed, by some of the children of Francis Trappes, the grandfather, for the purpose of having their portions raised out of the estate charged therewith. The trustees afterwards entered into an agreement with Rawson for the sale of the Nidd and Susacres estates; and, thereupon the plaintiffs filed a supplemental bill, against Rawson and the trustees, praying that the sale might be carried into execution under the decree of the court.

Both these causes were set down to be heard; but a decree was made in the first cause only, by which it was referred to the master to take an account of what was due, to the plaintiffs and the other younger children of Francis Trappes, the grandfather, for principal and interest, in respect of the 5,000*l.* charged on the premises comprised in the deed of the 19th of May 1787. And the master was directed to take an account of the liens, charges, and incumbrances affecting the estates, and to ascertain their priorities, and what was due upon the same. At the same time, the suit, instituted against Rawson, was ordered to stand over, to enable the trustees to proceed with the agreement for the sale. Disputes having arisen, between the trustees and Rawson, in consequence of the various incumbrances on the Nidd estate, which it was difficult to adjust, the bill in the third suit was filed, by Rawson, for the purpose of having his contract rescinded. By an order in that suit the title was referred to the master. After various proceedings had

* The above recital was copied, *verbatim*, from the master's report; it did not state, particularly, how the residue of the produce of the stock was disposed of.

been had upon this reference, the incumbrancers agreed to join, without prejudice to their claims, in such a conveyance as the master should approve, upon the purchase-money being paid into court; which was, at length, carried into effect; and the purchase-money was, by an order made in the three causes, paid into court in trust in those causes.

Cranmer submitted, to the Master, that, by means of the several assignments to him and his trustees, and the mortgage to him, and the possession of the title-deeds of the Nidd estate, he became and was the first incumbrancer on that estate, after satisfying the portions.

Sir Henry Lawson, Bart., being a creditor of F. M. Trappes, under a judgment obtained in or as of trinity term 1812, and registered at Wakefield on the 14th of November in the same year, went in before the Master and proved that there was due to him, for principal and interest, 2,944*l.* 19*s.*

Attempts having been made, by Cranmer, to postpone Sir Henry Lawson's security to his own, on account of his having got in the legal estate and outstanding terms, as before mentioned; Sir Henry Lawson, with a view to fix him with notice of the judgment, obtained an order for liberty to examine witnesses in support of his case; and, afterwards, he obtained another order for liberty to examine George Pocock and John Innes Pocock (who were the solicitors both of Cranmer and F. M. Trappes, and also trustees of the terms the benefit of which was claimed by Cranmer) as to their having had notice of his judgment.

It appeared, upon the examination taken under this order, that George Pocock was apprised, of the existence of the judgment, between the 1st and 11th of July 1814, when search was made, under his direction, for judgments against F. M. Trappes. The Master, by his report, stated that various claims had been brought in before him on behalf of divers persons claiming to be incumbrancers upon the estates; but that, by reason of their adverse and conflicting claims, he had found it difficult to arrive at a satisfactory result as to the priorities of the incumbrances: that he had, therefore, thought fit to submit to the court the natures of the several charges and incumbrances, and to state the nature of the claims for priority and indemnity, which had been insisted upon before him, together with the opinion which he had been able to form, and the conclusion which he had arrived at in respect of the same. The Master then, after stating the substance of the deeds of the 30th and 31st of May 1811, of the 16th of July of the same year, of the 30th of June and 1st of July 1814, the assignment, of the 1,000 years term, by Hill to George Pocock, and the assignment of the 500 years term to the same person, in trust for Cranmer, stated that, upon consideration of Sir Henry Lawson's claim, and of the evidence given in support of it, and what had been alleged before him on behalf of Sir Henry Lawson, the defendants the trustees of the estates, and the defendant Cranmer, he was of opinion that Sir Henry Lawson was entitled to be considered as an incumbrance, in respect of the judgment, upon the whole of the produce of the Nidd estate, after satisfaction of the portions appointed, as well as to the children of Francis Trappes, the grandfather, as to the children of the defendant F. M. Trappes, as hereinbefore set forth; and also of the sums of 500*l.*, and 3,000*l.* and the interest thereof, secured by the two terms of 500 years and 1,000 years, created by the indentures of the 19th of May 1787, and the 20th of December 1794,

and such of the incumbrances on the estate for life of F. M. Trappes of and in the same estate, effected previously to the 31st of May 1811, and on the fee simple of the estates, by terms of years or otherwise, from that time to the 14th November 1812, when the judgment was registered, as were existing and unsatisfied on the 14th of November 1812. And the Master was, also, of opinion that Sir Henry Lawson was the first incumbrancer upon the produce of the Susacres estate.

The causes now came on to be heard for further directions.

The Solicitor-General and Mr Knight, for the defendant Cranmer, said that, at the time when the judgment was entered up, the legal estate was in a trustee: that the only remedy which a judgment creditor had, in such a case, was under the statute of frauds: that, to give him that remedy, he must sue out execution against the trustee: and that, as Sir Henry Lawson had not issued an *elegit* he had no right to be paid out of the produce of the estates. Hunt *v.* Coles, Com. Rep. 226; Harris *v.* Booker, 4 Bing. 96.*

Mr. Witham for Sir Henry Lawson:

Before the statute of frauds, a judgment creditor could not have execution against any lands of his debtor, except those of which the debtor was actually seised, and not against those of which he was merely *cestui que trust:* but he might have filed a bill in equity to remove any impediment to his having execution, or to redeem a prior incumbrancer. But, if the judgment creditor did not issue his *elegit*, or file his bill, before the estate was conveyed away, his remedy was gone, unless the grantee had notice of the judgment. The statute of frauds enabled the sheriff to give execution of trust estates, in the same manner as he could previously have done of legal estates, 29 Car. 2, c. 3, s. 10. But it was decided in Lyster *v.* Dolland, 3 Bro. C. C. 478, S. C., 1 Ves. jun. 431, that an equity of redemption is not within the statute. Where then would be the use of issuing an *elegit*, as an equity of redemption is not extendable? Besides, the circumstance of the Pococks, who were Cranmer's trustees, having notice of the judgment, removes, at once, every objection to Sir H. Lawson's claim. Bacon *v.* Ashby, Finch, 366; Davis *v.* The Earl of Strathmore, 16 Ves. 419; Toulmin *v.* Steere, 3 Mer. 210; Forth *v.* The Duke of Norfolk, 4 Madd. 503.

The Vice-Chancellor said, that Cranmer was entitled to priority over Lawson, in respect of the sums paid by him on procuring the assignments of the terms of 500 years, 1,000 years and 99 years, created by the deeds of the 19th of May 1787, the 20th of December 1794, and the 15th of May 1809, and for redeeming the annuity granted, to Davis, by the deed of the 16th of July 1811; those incumbrances having been created prior to the time when the Pococks had notice of the judgment; but that Cranmer's claim in respect of the residue of the produce of the bank annuities, must be postponed to Lawson's.

The next question was whether Sir Henry Lawson was entitled to interest on his debt: and it was said, on behalf of the opponents to his claim, that he, being a judgment creditor, was not entitled to interest. It appeared however that the warrant of attorney authorized the judg-

* And see Sugden, Vendors, 8th ed. 478, *et seq.*

ment to be entered up for double the amount of the sum actually due; and contained a defeasance on payment of that sum, with interest, on a certain day. Under these circumstances the Vice-Chancellor said that Sir Henry Lawson was entitled to interest on the sum actually due to him; and, accordingly, the order on further directions, referred it to the Master to compute interest on that sum, but directed that the principal and interest should not exceed the amount of the penalty of the judgment.

It was then said that Sir H. Lawson's demand must be confined to a moiety of the produce of the estate, because a judgment creditor was entitled, at law, to have possession of a moiety only of the lands of his debtor delivered to him. But the Vice-Chancellor, upon the principle that a judgment creditor was entitled to redeem the entirety of lands comprised in a prior mortgage, ruled that Sir H. Lawson's claim extended to the whole of the produce of the estate remaining after satisfaction of the prior charges.*

Mr. Knight, for the defendant Cranmer, then said that, after Sir H. Lawson's judgment was entered up, F. M. Trappes had exercised the power reserved to him by the recovery deed of the 31st of May 1811, whereby the fee which was vested in him was displaced, and the judgment defeated†; that the question whether the execution of a power defeated the lien of a judgment creditor, was then pending before the court of King's Bench, in a case of Doe *v.* Jones.

The Vice-Chancellor referred to the cases of Maundrell *v.* Maundrell, 10 Ves. 246, and Ray *v.* Pung, 5 Madd. 310; and 5 B. & A. 561, and expressed it to be his opinion that, under the circumstances stated by Mr Knight, Sir H. Lawson's judgment was defeated: but his honor said that it would be improper for him to decide the point, as the judges of the K. B. had not yet decided upon the case that had been mentioned to be then before them.

The cause subsequently came before the court, to be spoken to upon the minutes of the decree on further directions; and it was then stated that the judges of K. B. had decided, in the case of Doe *v.* Jones, 10 Barn, and Cress. 459, that the lien of a judgment creditor was defeated by the execution of a power of appointment. Upon which Mr Witham, for Sir H. Lawson, stated that, by the proviso in the deed of the 16th of July 1811, the estate was, on the annuity granted to Davis being redeemed, to be re-conveyed to F. M. Trappes, his heirs and assigns; and that Trappes having exercised his power, became seised of the equity of redemption in fee, upon which the judgment attached: and the Vice-Chancellor decided that Sir H. Lawson's claim was entitled to the priority assigned to it, as before-mentioned.

A QUESTION, similar to the one in the preceding case, as to the effect

* See Stileman *v.* Ashdown, 2 Atk. 477 & 608.

† This argument seems to be founded upon the assumption that the mortgage to Cranmer (like that to Boulcott), purported to be an appointment. But that does not appear to have been the fact.

of notice of an unregistered judgment, arose upon a claim made by Messrs Goslings & Sharpe, under the following circumstances:

By indentures of lease and release, of the 19th and 20th of June 1816, the release being made between F. M. Trappes of the first part, Cranmer of the second part, and Captain Nicholas Pocock, since deceased, of the third part, a certain portion of the premises comprised in the deed of the 1st of July 1814, but which was not comprised in the deed of the 27th of August of the same year, was appointed by Trappes, in exercise of his power, under the deed of the 31st of May 1811, and was also conveyed by him and Cranmer, to Nicholas Pocock, in fee, in trust to sell, and, out of the proceeds, to re-purchase 2,000*l.* stock, lent by N. Pocock to Trappes; and Trappes charged the equity of redemption of the premises comprised in the deed of the 27th August 1814, with the re-transfer of the stock, and covenanted that, in case the proceeds of the sale of the premises comprised in the present deed, should be insufficient to re-purchase the stock, that N. Pocock should be empowered to direct any other part of the Nidd estate to be sold: and Trappes declared that Geo. Pocock and John Innes Pocock, and all other the trustees of the terms of 500 years and 1,000 years, and of any other terms in the premises comprised in this deed, should stand possessed of such terms so far as they regarded those premises, in trust for further securing the re-transfer of the stock.

By indentures of lease and release, of even date with the last-mentioned deeds, and made between F. M. Trappes on the one part, and Scroope, Tasburgh and Venner (who was described as a trustee appointed on behalf of Cranmer and N. Pocock) of the other part, after reciting that F. M. Trappes was desirous of vesting his estates in trustees for sale, in order to pay off the mortgages to Cranmer and Nicholas Pocock, and the other mortgages and judgments on his estates, the whole of the Nidd and Susacres estates were appointed by Trappes, in exercise of his power, under the deed of the 31st of May 1811, and were also conveyed, by him, to Scroope, Tasburgh and Venner, in fee, upon trust, in the first place, to protect Cranmer and Pocock, and the hereditaments comprised in their respective securities, of the 27th of August 1814, and of the 20th June then instant, from the claims of the several portioners, annuity and judgment creditors of F. M. Trappes; and then upon trust to sell, and out of the proceeds, to pay the principal and interest then due to Cranmer and N. Pocock, and, in the next place, to pay off the several other mortgages mentioned in the schedule to the present deed, and such other mortgages as might be then charged on the trust premises, and then to pay off the judgment debts of F. M. Trappes. A judgment obtained by Messrs Goslings & Sharpe, was one of those mentioned in the schedule. This judgment was entered up on the 12th of March 1816, for 600*l.*, to secure the payment of 300*l.* on a certain day, and which sum was then secured, with lawful interest, to Goslings & Sharpe, by Trappes's promissory note. The conveyance to Scroope, Tasburgh and Venner was registered in October 1820, but the judgment was not registered until January 1821.

The Master having reported as to the priority which John Innes Pocock and Geo. Pocock (who were the devisees and residuary legatees of Nicholas Pocock) were entitled to in respect of the latter's se-

curity, stated that it had been submitted to him, on behalf of Messrs Goslings & Sharpe, that they were entitled to be considered as incumbrancers, in respect of their judgment, immediately before, or to stand in the place of the defendants John Innes Pocock and Geo. Pocock, as the devisees of Nicholas Pocock; inasmuch as, previously to the date and execution of the first-mentioned indentures of the 19th and 20th of June 1816, N. Pocock and the last-named defendants, had notice of the judgment: and that the same was, in consequence, mentioned or referred to, in the deed of trust for sale bearing date the same 20th of June 1816, as an existing judgment, and as an incumbrance effecting the estates. The Master then stated it to be his opinion, that, inasmuch as the judgment was mentioned or referred to, in the conveyance to the trustees, as an incumbrance then affecting the Nidd estate, and as John Innes Pocock and Geo. Pocock were, at the date of such conveyance, the solicitors for F. M. Trappes, and also for Nicholas Pocock, the latter must be deemed to have had, by means of his said solicitors, notice of the judgment: and that Messrs Goslings & Sharpe were, therefore, entitled to stand in the place of John Innes Pocock and Geo. Pocock, as such devisees as aforesaid, to the extent of the sum due upon the judgment: but the Master did not allow interest upon that sum.

Mr Pepys and Mr Turner, for the defendants, John Innes Pocock, and George Pocock:

The notice which the Master refers to, in his report, was, at the utmost, constructive only. But constructive notice is not sufficient to give priority to an unregistered incumbrance over a registered one. Nothing but actual notice will have that effect. Wyatt *v.* Barwell, 19 Ves. 435.

But Nicholas Pocock had not even constructive notice in this case. His security takes no notice of the judgment, and he was no party to the conveyance to the trustees for sale; and, therefore, that conveyance can not be read against his devisees. Notice to a solicitor will not effect the client, unless it is acquired in the particular transaction in which he is acting for his client. Nicholas Pocock's security was complete before the conveyance was executed, from which, it is said, the notice was obtained. He had a power of sale under his own deed; and, therefore, he gained no additional security under the conveyance to the trustees. It is evident that Messrs Pocock were acting as the solicitors for Trappes and the other incumbrancers, in preparing that deed.

Mr Kindersley, for Messrs Goslings & Sharpe:

The deed, under which my clients are scheduled creditors, bears the same date as Nicholas Pocock's security. Venner is named in it, as a trustee for N. Pocock, and it was attested by a clerk of Messrs Pocock. One object of that conveyance was to indemnify Nicholas Pocock against certain claims, and the other object was to sell and pay off all the incumbrances. The recital in the trust-deed shows that it was intended to make a provision for the payment of the debts due to Cranmer and N. Pocock, and then of the other mortgages and judgments. The notice renders the want of registration unimportant. Le Neve *v.*

Le Neve, 3 Atk. 646; Davis *v.* Lord Strathmore, 16 Ves. 419; Bushell *v.* Bushell, 1 Scho. & Lefr. 103; Eyre *v.* Dolphin, 2 Ball & Beat. 290.* The notice was not constructive, for notice to a solicitor is actual notice to the client.

The Master ought to have allowed interest on the debt. The judgment was given with a penalty; and the debt originally carried interest. Gwyn *v.* Godby, 4 Taunt. 346.

Mr Pepys, in reply:

Though the judgment was given in a penal sum the defeasance does not specify anything about interest.

The Vice-Chancellor:—Where a security is given for the payment of a particular sum on a certain day, that sum will carry interest from the day on which it is to be paid.

Mr Pepys:—The rights of Nicholas Pocock could not be affected by a subsequent deed to which he was not a party. The act of the 5th and 6th of Anne, c. 18, for registering incumbrances on estates in the West Riding of Yorkshire, expressly provides that judgments shall have no effect at all, until they are registered.† With respect to deeds, it is different. They, though unregistered, are good as against the party. But unregistered judgments do not, in any degree, affect estates. If this judgment did not bind Trappes, it could not affect N. Pocock, who was a purchaser from him, even if he had actual notice.

The Vice-Chancellor. In this case, Nicholas Pocock, at the time when he took the conveyance to himself, in trust to sell, as a security for the stock which he had lent to Trappes, took another security for the loan; and that security mentions the judgment debt. I had a general notion that, where a party had notice of a judgment, it would bind him, notwithstanding the express words of the registry acts. But I will not decide the point until I have had an opportunity to consider it.

*December* 15.—On this day, his Honor said that notice to a solicitor was actual notice to the client: that it must be admitted that the security to Nicholas Pocock, and the trust-deed for sale, were parts of one and the same transaction; and therefore that the solicitors of N. Pocock must have had notice of the judgment, prior to the execution of the security to their client. His Honor then referred to the cases of Le Neve *v.* Le Neve, and Davis *v.* Lord Strathmore, and said that the language of the Middlesex Register Act, 7 Ann. c. 20, as to the registration of judgments, was quite as strong as the language of the West Riding Register Act upon the same subject; and that he was, therefore bound, by the decisions in those cases, to say that as N. Pocock had notice of the judgment, through his solicitors, he was as much bound by it, as if it had been duly registered: that, consequently, his

* See also Sugden, Vend. 8th ed. 706.

† By section 4th of that act, it is enacted, "That no judgment which shall be obtained after the 24th day of June 1707, shall effect or bind any manors, lands, tenements or hereditaments, situate, lying, and being in the said West Riding, but only from the time that a memorial of such judgment shall be entered at the register office.

opinion was that, the Master's report was right, so far as it found that Messrs Goslings & Sharpe were entitled to stand in the place of Nicholas Pocock, to the extent of what was due upon the judgment; but that, inasmuch as the judgment was given for a penal sum, to secure the payment of a smaller sum, at a given time, the Master ought to have allowed interest, on the sum actually due from the time when the judgment was entered up, but so that the principal and interest did not, together, exceed the amount of the penalty. And his Honour referred it to the Master to compute interest upon the 300*l.*, at the rate of 5 per cent., from the time when the judgment was entered up.

In February 1791, the plaintiff Margaret Tunstall, widow, one of the younger children of Francis Trappes the grandfather, intermarried with William Tunstall, who afterwards died: and, in contemplation of such marriage a settlement was made between Francis Trappes, the grandfather, and Margaret his wife, of the first part, Margaret Tunstall of the second part, William Tunstall of the third part, and Thomas Taylor and Thomas Mitchell of the fourth part. But this settlement was lost, and the only evidence that was produced, before the Master, to show that such a settlement was in fact, made, was the probate of the will of F. Trappes, the grandfather, by which the settlement was recognized, and in part recited, and a memorial of a settlement registered at Wakefield, on the 14th of October 1793, which contained the names and discriptions of the parties to the settlement, and referred to the bargain and sale of the 19th May 1787, and to the estates thereby conveyed. There was also produced before the Master a copy of a deed purporting to be of such date and to be made between such parties as aforesaid; but it was not attested, or in any manner authenticated as a true copy of the settlement. This copy, after reciting among other things, the bargain and sale, and recovery of 1787, and the intended marriage, witnessed that Francis Trappes, the grandfather, in pursuance of the power vested in him by the bargain and sale, did thereby charge, the hereditaments comprised in the bargain and sale and recovery, with the payment of one ninth part of the sum of 5,000*l.*, immediately after his death, to Taylor and Mitchell, upon the trust thereinafter mentioned; and that, in further pursuance of the power, Francis Trappes, the grandfather, appointed one undivided ninth part of the hereditaments to Taylor and Mitchell, for 900 years, as a further security for the payment of the ninth part of the 5,000*l.*, subject to the trusts of the term of 500 years: and it was declared that the ninth part of the 5,000*l.* should be vested in the trustees, upon trust, to pay the interest thereof to Margaret Tunstall, for her separate use, during her coverture with William Tunstall; and in case she should die in his lifetime, to pay the interest to William Tunstall, for life; and, after the death of the survivor, to stand possessed of the principal, in trust for the issue of the marriage that should be living at the death of the survivor, in such manner as Margaret Tunstall should appoint, and, in default of appointment, in trust for such issue, in equal shares, and, in default of such issue, in trust for such persons as Margaret Tunstall should by deed or will, appoint, and in default of appointment, in trust for the other younger children of Francis Trappes, the grandfather, who should be then living.

[Tunstall *v.* Trappes.]

This settlement was referred to in the deed of the 20th of December 1794; and Francis Trappes, the grandfather, by his will dated the 15th of December 1801, recited the settlement, and ratified and confirmed it, and charged the estate with the remainder of the 5,000*l.*, for the portions of his other younger children. The testator, in a codicil, recited the appointment made by his will, and that Dorothy Trappes, one of his younger children, had since died, and that in consequence thereof the appointment made by him upon the marriage of Margaret Tunstall, would take effect, as to one eighth of the one ninth part of the 5,000*l.* which he had appointed, by his will, to his daughter Dorothy. The testator then disposed of Dorothy's share amongst Margaret Tunstall, and some of his other younger children.

The Master, in his report, stated that, inasmuch as the settlement of February 1791, had not been produced before him, he was unable to ascertain whether the appointment of the ninth part of the 5,000*l.*, in favour of Margaret Tunstall, was a good appointment; and he, therefore, submitted to the court whether, under the circumstances aforesaid, the power reserved to the testator, by the bargain and sale of May 1787, ought or ought not to be considered as having been exercised by him, so far as regarded the one ninth of the 5,000*l.*, alleged to be appointed by the settlement of February 1791. But, in case the court should be of opinion, either upon the production of further evidence, or the consideration of the circumstances before mentioned in respect of the settlement, and having regard to the time which had elapsed since the date thereof, and the acquiescence therein of all parties, which was to be implied from there not having been any objection taken thereto, or to the claim founded thereon, during all the time which had elapsed, that the settlement ought to be considered as a good appointment, he found that, in such case, Margaret Tunstall would be entitled to the interest on her share of the 5,000*l.*, which accrued during her coverture.

Mr Rose and Mr Seton for the plaintiff Mrs Tunstall, contended that her claim, in respect of her portion, was sufficiently established by the circumstances stated by the Master; especially as it had never been disputed by any of the numerous persons who had advanced money on the security of the estate. They cited Skipwith *v.* Shirley, 11 Ves. 64; Ward *v.* Garnons, 17 Ves. 134; Villiers *v.* Villiers, 2 Atk. 71.

The Vice-Chancellor held that the evidence of the settlement, stated in the Master's report, was sufficient; and declared that the power of appointment reserved to F. Trappes, the grandfather, by the deed of the 19th of May 1787, was well executed by the settlement of February 1791, and by the deed of the 5th of February 1795, and the will and codicil of F. Trappes the grandfather, by which the remainder of the 5,000*l.* was appointed to his other younger children.

Mr Rose and Mr Seton then contended that, under the settlement of February 1791, Mrs Tunstall was entitled to the interest for her life, of the one ninth of the 5,000*l.* appointed by that instrument: they said that the trusts were to pay the interest to Mrs Tunstall, for her separate use, during her coverture, and, in case she should die in the lifetime of her husband, then to pay the interest to him, for life, and, after the death of the survivor, to stand possessed of the principal in trust for the issue of the marriage: that there was evidently a mistake in the

settlement, as it could not be supposed that a life interest was not to be given to Mrs Tunstall; that the only question was whether the court could correct the mistake: that it might be corrected by reading the words printed in italics, as in a parenthesis: that that would give Mrs Tunstall a life interest by operation of law, and would be consistent with the gift over after the death of the survivor of her and her husband, which would otherwise be inconsistent with the prior trusts; Doran *v.* Ross, 1 Ves. jun. *57*.

The Vice-Chancellor held that Mrs Tunstall was entitled under the settlement to the interest of the one ninth of the 5,000*l*.

## Cockerell *v.* Cholmeley.

3 *Simons*, 313.

Leave given, before publication, to examine a witness (who had been examined and cross-examined) as to circumstances brought to his recollection, after his examination in chief.

January 23, 1830.

A MOTION was made in this cause, that the plaintiffs might be at liberty to exhibit additional interrogatories, before the examiner, for the further examination of a witness, who had been already examined on behalf of the plaintiffs, and that the defendant might, if he should think fit, be at liberty to exhibit further interrogatories for the cross-examination of the same witness. Affidavits in support of this motion were made by the solicitor for the plaintiffs, and by the witness. The purport of them was that publication had not passed, but had been enlarged till the last day of the term: that the transactions which formed the subject-matter of the suit, took place in or about 1783, a period of nearly 50 years ago, on account of which circumstance it had been found extremely difficult to collect evidence in support of certain facts which the plaintiffs had been advised it was material for them to establish: that, for the purpose of obtaining such evidence, application had been made to R. Nowell, solicitor, who for many years was the solicitor of Sir H. C. Englefield, deceased, one of the parties materially concerned in the said transactions, as likely to be acquainted with many of the facts and circumstances relative thereto: that Nowell was, accordingly, examined by one of the examiners, and signed his depositions on the 21st of December then last: that Nowell had been cross-examined and signed his depositions on the 23d of the same month: that, on the 22d of the same month, Nowell, before he went before the other examiner, to be cross-examined, in order to refresh his memory, searched, amongst the various documents in his possession, relative to the affairs of Sir H. C. Englefield, and then, for the first time discovered a bill of costs, for business done by him for Sir H. C. Englefield, in or about 1808: that Nowell forthwith communicated this discovery to the plaintiff's solicitor, and furnished him with a copy thereof: that proof of the facts to which the

bill of costs referred, would form material and necessary evidence for the plaintiffs, and that they would be unable to prove any of those facts, except by Nowell's evidence: that the facts to which the bill of costs referred, were wholly unknown to the plaintiffs and their solicitor prior to the 22d of December then last; and that, therefore, no interrogatories had ever been exhibited for the purpose of obtaining evidence as to them: that until Nowell discovered and perused the bill of costs and an attendance book, in his own hand-writing, the existence thereof, and of the several facts and circumstances to which the same referred, had entirely escaped his recollection; and that it was only, by the accidental finding of the bill, that the particulars of the business therein contained, recurred to his mind: that he was, therefore, unable to communicate, and did not, in fact, communicate any information respecting the several facts and circumstances referred to by the said bill of costs and attendance book, to the plaintiffs, or their solicitor, until the 22d of December then last.

Mr. Cockerell appeared for the plaintiffs in support of the motion.

Sir C. Wetherell and Mr Lynch, for the defendant, opposed the motion, and cited Lord Abergavenny *v.* Powell, 1 Mer. 130. They said that the plaintiff's solicitor had not sworn, in his affidavit, that Nowell had not informed him, of the effect of his evidence on cross-examination.

Mr. Cockerell, in reply:

An affidavit shall be made that no communication has been made, by Nowell, to the plaintiff's solicitor, of his evidence on cross-examination. The case of Lord Abergavenny *v.* Powell does not apply, for this is not a case in which a witness seeks to explain his testimony. If we had wished to examine a different witness, no order would have been necessary.

The Vice-Chancellor: I incline to think that this motion ought to be granted.

I take it as a fact, that the witness has not communicated the effect of his testimony on cross-examination. It is not intended that he should explain any thing: and, if I were to refuse this motion, the cause would proceed, in its present state, and the plaintiffs would then move for leave to file a bill of review. I shall, therefore, allow the witness to be examined as to the matter to which it is sought to examine him.

Motion granted: costs to be paid by the plaintiffs.

## Lewis *v.* Bridgman.

3 *Simons*, 316.

A PORTIONER entitled to tithe-hay is not necessarily entitled to tithe of clover, tares, vetches, and grass cut and carried away green: Semble.

[Lewis *v.* Bridgman.]

A terrier, though signed by churchwardens only, is admissible evidence in a suit for tithes, by a portioner against an occupier.

A portioner is not entitled to an issue as a matter of right.

January 25, 28, 1830.

## Wellman *v.* Bowring.

3 *Simons*, 328.

By a marriage settlement the ultimate trust declared of a copyhold estate, (the property of the husband,) was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate which was her property. The wife survived and took out administration to her husband: held that she was not entitled to hold the former estate, for her own exclusive benefit, but for the benefit of herself and her husband's next of kin.

January 27, 28, and Feb. 1, 1830.

BY the decree made by Sir John Leach, V. C., on the hearing of this cause,* it was declared that Elizabeth Bryant, in the pleadings named, was, as the administratrix of the goods and effects of her husband Joseph Bryant, entitled to the equitable fee in the copyhold or customary estate in question in the cause, and, as such administratrix, also entitled to call upon the defendant, Joseph Bowring, for a surrender to her of the said estate. And it was ordered that it should be referred, to one of the Masters of the court, to inquire and state who were the next of kin of the said Joseph Bryant, living at the time of his death, and, if any of them had since died, who was or were the personal representative or representatives of him, her or them so dying.

The Master found that the defendants Joseph Bowring, Mary Genge, George Bowring and Elizabeth Weaver, together with John Bowring and Jane Axe, were the only next of kin of the said Joseph Bryant, living at the time of his death: that John Bowring and Jane Axe had since died, and that the defendants, Richard Genge and James Mawson Hansford were the legal personal representatives of Jane Axe, but he did not find that there was any legal personal representative of John Bowring.

The cause now came on to be heard for further directions.

Mr Horne, Mr. Pepys and Mr. Preston for the plaintiff:

There is neither any express nor any implied trust, in this case. If Mr and Mrs Bryant had had more than two children, it would be difficult to contend that the two, who took under the limitations of the settlement, should not take for their own benefit, but be trustees for the rest of the family. In default of issue, the trustees were to surrender the estate *to the use* of the appointees, and, in default of appointment, to *the use of* the executors or administrators. How

* See 1 Sim. & Stu. 24, and 2 Russ. 374.

then can it be contended either that the appointees, or the executors or administrators, were not intended to take beneficially. If the executors or administrators were intended to be trustees, why are they substituted for the trustees of the settlement. This, being copyhold property, is not assets for payment of debts. The trust in favour of the executors and administrators, contains the same restriction as to numbers, as the trust in favour of the children. A limitation as to numbers, when applied to executors or administrators, can not be applied to them officially. The settlor must have had the same intention with respect to them, as he had with regard to the children. If he had intended that the executors or administrators should hold the estate upon any trust, he would have declared the trust. It was in the power of the settlor, when he made his will, to name his executors. If he named none, the relationship to the settlor would have pointed out who were to be his administrators.

In the argument in Ripley *v.* Waterworth, 7 Ves. 425, a case was cited, from Salkeld,* which was decided between the passing of the statute of frauds and the 14 Geo. 2, c. 20. In that case it was held that, under the statute of frauds, the estate was made assets for payment of debts only. That was a decision that persons taking as personal representatives, might take beneficially. A similar rule was adopted in Evans *v.* Charles, 1 Anstr. 128.† Where is the liability to pay debts, found to be imposed upon this copyhold property? Sanders *v.* Franks, 2 Madd. 147. It never was the property of the person whose next of kin are now claiming it. The property never was in the author of the settlement. His executors or administrators take it as purchasers, and not in their representative character. He was tenant for life, with a power of appointing two executors. This case comes within the statute of frauds, which says that no trust shall be raised except by writing. Could the executors or administrators be sued as such? If the trust had been as express, for the heirs, as it is for the executors or administrators, they could not have been sued at law. The estate is not an asset of the settlor, either at law or in equity. No probate-duty would be payable upon it. How can property, that never was vested in a party, be applicable to pay his debts? Cranmer's case, Dyer, 309 a. This case is most ably elucidated in 5 Bac. Ab. 733, 734. If the limitation to executors had been made by a prior owner, it would have been part of his own dominion. This interest never was his property. The court can not make it an asset of his. If it had been limited to the right heirs of A. B. they would have taken as purchasers: and it would not have been held that they took it as real assets of A. B. If it was not property in the party, his executors or administrators could not take it as part of his assets. This estate, being copyhold, never could be an asset at law. Prior to the statute of frauds, an heir taking as special occupant, was not liable to debts. If it had been a legal estate, and not an equitable one, a court of law could not have reached it. If not, how can this court reach it? If it was not an asset at law, it can not be an asset in this court. If the

* Oldham *v.* Pickering, 2 Salk. 464.

† Upon this case being cited, the Vice-Chancellor said that a case had been decided which was much at variance with it. See Bridge *v.* Abbott, 3 Bro. C. C. 224.

limitation had been to the executors or administrators of the wife, they, certainly, would not have been liable.

The whole of the settlement is a declaration of trust, except as to the interest now in dispute. This shows that the executors or administrators were not intended to be trustees of it. If, however, the executors or administrators are to take the property as trustees, then the widow will be entitled to one half of it.

The Solicitor-General, Mr Garratt, and Mr Teed, for the defendants: Throughout the settlement, every limitation is governed by the necessity of not going beyond two persons, by reason of the custom. An implied trust can not be raised, where the character of the objects is such as to raise a trust: as in the case of children. The children were the principal objects of the settlement. The executors or administrators were not the objects of the settlement; therefore it can not be argued that the latter were intended to take beneficially, because the former were intended to do so. There were no children to take, in their own character, and the other objects of the settlement, take in respect of their office only.

Lord Eldon said that the husband and wife might contract, with each other, to convert the copyhold into personal estate, see 2 Russ. 379. There is nothing, in the statute of frauds, which prevents a trust from being raised by implication. As to the estate not being assets, because the property was not vested in Joseph Bryant, he had in himself the whole property: and the trust of a copyhold for life, is assets. Cranmer's case is not an authority for the purpose for which it has been cited. The decision turned on the limitation to the grantor, his heirs and assigns, which is found in the argument, but not in the statement. The ultimate decision in that case, took place in 44th Eliz.* and was expressly the reverse of what was decided originally in 14 Eliz.

The decision in Sanders *v.* Franks is of questionable authority; and the words "for his and their own use," upon which that case was decided, are not found here. Evans *v.* Charles has been frequently denied to be law. To make property assets, it is not necessary that it should be personal property in the party whose assets it is. Utben *v.* Godfrey, Dyer, 309, b. note 78. The case in Salkeld has been, long since, overruled. In Ripley *v.* Waterworth, Lord Eldon says: "In the case in Salkeld, the question arose in a court of law, between the statute of frauds, and the other statute, whether the court would compel him to do more than to pay the debts. The decision, as far as it goes, is that the court would not interfere further. Yet I doubt whether an executor or administrator ever takes anything, as such, that he would not be bound to apply as personal estate of the testator, 7 Ves. 438." If anything is taken in the character of executor or administrator, it must be part of the personal estate of the party represented, and must be applied as such; as in the case of stock belonging to a testator whose will is not attested by two witnesses. The administrators may not be children; they may be creditors. Suppose that they are credi-

* The reporter was not able to find the decision above referred to. There is a case of Sparke *v.* Sparke relating to the question discussed, and which was decided in 44 & 45 Eliz. See Moore's Rep. 666; Cro. Eliz. 666 & 840; Yelv. 9.

tors for 5*l.*, and that there are other creditors for 1,000*l.*; could the former take the whole? They could get it only on the ground that it was assets for payment of their debts. Whether an executor or administrator takes, as executor or administrator, he takes subject to debts, and to all the rights which exist against an executor or administrator.

None of the limitations after those to the husband and wife, are to take effect until after the death of the survivor of the husband and wife. Yet it is said that the wife was intended to take, if she survived her husband. Suppose that the wife had died within two calendar months after the death of her husband, and administration *de bonis non* of her husband had been granted; who would have been entitled? Clearly not the wife's representatives. She took an express estate for life: the limitation to the executors or administrators is not to take effect till after her death. The clear effect of the instrument is that the executors or administrators were intended to take the property, in their official character only. The limitation to them was meant to give a beneficial interest to the persons entitled under the will of the settlor, in case it was not attested, so as to be an execution of the power contained in the settlement, or to his next of kin, in case he died intestate.

Lord Eldon in his judgment upon the appeal in this case, says: "Another question is whether the limitation being to the person by the description of an office, namely, to executors or administrators, the wife, taking the copyhold as administratrix of her husband, took it for her own use and benefit? May it not be held, by analogy to those cases in which the executor taking leases *pur autre vie* as special occupant, has been deemed a trustee for the next of kin of his testator, that the meaning of the parties in the agreement made on their marriage, was that the executor or administrator was to take the copyhold estates for the purpose of making each copyhold, so coming to him, a personal interest of the husband and wife respectively," 2 Russ. 380. Lord Eldon's opinion, therefore, seems to be clearly in our favour. It was quite accidental who would be the executors or administrators. As the custom of the manor would not allow of there being more than two tenants, the limitation in question, was a device to keep the property in the settlor's own family; and there were no persons who could be so properly pointed out for that purpose, as those who were to have the administration of the settlor's personal estate. Westfaling *v.* Westfaling, 3 Atk. 460. Sutton *v.* Chetwynd, 3 Mer. 249. Duke of Devon *v.* Kinton, 2 Vern. 719, & 2 P. W. 381. Price *v.* Strange, Madd & Geld. 159.

The Vice-Chancellor. All the useful learning upon the question that has arisen in this cause, is to be found in the report of the case of Ripley *v.* Waterworth.

The general opinion is, that whatever a person takes as executor or administrator, he takes as part of the personal estate of the testator or intestate. Nothing in the course of the argument has shaken what is laid down by Lord Eldon in Ripley *v.* Waterworth. All the cases that have been cited show a gradual convergence of mind to the decision which he came to in that case.

Evans *v.* Charles has nothing to do with the present question; nor has the case of Sanders *v.* Franks any bearing upon it.

The judgment delivered by Lord Eldon, upon the appeal, contains a clear expression of opinion that the ultimate limitation to the executors, or administrators, could only be supported as a mutual contract, between the husband and wife, that, in the event of there being no issue of the marriage, and of the powers of appointment not being exercised, the personal estate of each of them should have a reciprocal benefit.* It appears to me, therefore, that I have an unerring light to guide me in deciding upon the point in this cause; and that I am bound to declare that Elizabeth Bryant did take the equitable fee in this copyhold estate, as the administratrix of her husband, and as part of his personal estate. The husband has been so long dead, that there can be no question as to whether all his debts have been paid or not: therefore, the persons entitled under the statute of distributions will take the estate.

Declare that Elizabeth Bryant is, as the administratrix of the goods and chattels, rights and credits of her late husband, Joseph Bryant, entitled to the equitable fee of the copyhold or customary estate in question, held of the manor of Slape, in the county of Dorset, as part of his personal estate, for the benefit of herself and the next of kin of the said Joseph Bryant, according to the statute for the distribution of intestates estates. Order that it be referred back to the Master, to take an account of the rents and profits of the said copyhold estate received by the plaintiff, or by any other person or persons by his order, or for his use, since he came into possession thereof; and that the amount thereof be answered by the plaintiff; that the copyhold estate be sold, with the approbation of the Master, and, in order to such sale, all deeds and writings in the custody or power of any of the parties, are to be produced before the Master, upon oath. Order, that the money to arise by such sale be paid into the bank, with the privity of the Accountant-General, to the credit of the cause, subject to the further order of the court. And, for the purpose of taking the said accounts, all parties are to be examined upon interrogatories, &c.; and are to produce, on oath, before him, all books, papers, writings, &c. And it is ordered, that the Master do tax the costs, charges and expenses, of all parties, of and relating to the suit and the appeal. And this court doth declare that the money to arise by such sale, and the amount of the said rents and profits, ought to be applied, first, in the payment of such costs, charges and expenses, and the residue divided in the manner following: one moiety thereof to the legal personal representative of Elizabeth Bryant, but in trust for the plaintiff Christopher Wellman, subject to the debts, if any, of the said Elizabeth Bryant, and the other moiety thereof to be divided into six equal parts; (that is to say,) one sixth part thereof for the use and benefit of the defendant Joseph Bowring; one other sixth part thereof for the use or benefit of the defendant Mary Genge; one other sixth part thereof for the use or benefit of the defendant George Bowring; one other sixth part thereof for the use or benefit of the defendant Elizabeth Weaver; one other sixth part thereof for the use or

* See 2 Russ. 379, 380.

benefit of the defendants Richard Genge and James Mawson Hansford, as the legal personal representatives of Jane Axe, deceased; and the remaining sixth part thereof for the use or benefit of the legal personal representative of John Bowring deceased. And it is ordered, that the Master do divide the same accordingly; and any of the parties are to be at liberty to apply, &c.

## The King of Spain *v.* Hullett.

3 *Simons*, 338.

A DEFENDANT against whom a *subpœna* is prayed, on his coming within the jurisdiction, is not, in substance, a party to the suit; and therefore the bill can not be amended after the expiration of six weeks from the time when the last of the answers of the defendants, who are within the jurisdiction, is to be deemed sufficient, though the other defendant may not have answered.

February 4, 1830.

## *Ex parte* Starkie.

3 *Simons*, 339.

Order for a reference as to maintainance out of an infant's freehold estate, made upon petition without suit.

February 4, 1830.

THIS was a petition presented by an infant, not in any suit, for an order for a reference to the Master as to maintainance out of his freehold estates, the rents of which were 260*l.* per annum.

Mr Booth appeared for the petitioner.

The Vice-Chancellor said that Lord Eldon had, during the latter part of his judicial life, refused to make an order for a reference, as to maintainance out of an infant's freehold estate, without suit: but that he could never discover the reason for such refusal, as the order discharged the party making the payment, to the extent only of the allowance made; and his Honour directed a reference to be made according to the prayer of the petition.*

* See *Ex parte* Lakin, 4 Russ. 307; and in the matter of Sir W. Molesworth, ibid. 308, in note.

## Grant v. Grant.

*3 Simons*, 340.

Where an obligor has, by vexatious proceedings, delayed the obligee from recovering on his bond, a court of equity will decree payment of the full amount of principal and interest, although it exceeds the penalty of the bond.

February 8, 9 and 11, and March 20, 1830.

SIR ALEXANDER GRANT, of Dalvey, in Scotland, Bart., the great-uncle of the plaintiff, Sir Alexander Gray Grant, being seized as heir of entail of the estate of Dalvey, and being seized in fee of certain plantations and estates in Jamaica, made his will, dated the 20th of April 1772, and thereby gave two sums of 3,000*l.* to each of his nephews, Peter Grant and James Grant, and a sum of 2,000*l.* to his nephew Charles Grant, the defendant; and he directed that the legacies he had so given to his nephews should not be or be held as a release or discharge of any debt they might owe to him at his death, but that each of them should be accountable for and pay such sums of money as they should respectively owe to him; and he directed the legacies to be paid, at the expiration of three years from his decease, with interest at five per cent. per annum, to commence from the end of one year after his decease; and he charged the legacies upon all his real and personal estates, except his real estate in Scotland; and he appointed his wife, Lady Elizabeth Grant, the Right Hon. James Montgomery, his brother, Ludovick Grant, and John Spottiswoode, and Peter Grant, his nephew, executors of his will. And he devised all his real estates (except his estate in Scotland) and the residue of his personal estate, to his executors, subject to his debts and legacies, in trust for the heir to the estate at Dalvey and his other estates in Scotland, for his life, with remainder to the next heir of entail of those estates, his heirs and assigns. He afterwards made a codicil, dated in July 1772, by which he directed that the legacies should not be paid till seven years after his decease.

The testator died on the 2d of August 1772, leaving his brother, Ludovick, who became Sir Ludovick Grant, his heir at law and heir of entail of the estates in Scotland. Upon the death of Sir Alexander Grant, the testator, the trustees and executors prevailed upon Alexander Grant, who was the eldest son of Sir Ludovick, and the father of the plaintiff, to go to Jamaica, and to act as their agent in the cultivation and management of the testator's estates in that island. James Grant was indebted to the testator, at his decease, in 684*l.* 6*s.* 3*d.*, which being deducted from J. Grant's legacy of 3,000*l.*, left a balance of 2,315*l.* 13*s.* 9*d.* due to him. By a deed, dated the 7th of February 1774, James Grant assigned the sum of 750*l.*, part of his legacy, to Sir Hugh Inglis, as a security for a debt due from him to Sir H. Inglis; and by an instrument of even date, he also assigned the sum of 750*l.*, other part of the same legacy, to Francis Russel as a security for a debt due to Russel. By another deed, dated the 2d of January 1779,

[Grant *v.* Grant.]

Peter Grant assigned his legacy of 3,000*l.* to James Grant, redeemable upon the payment of 4,000*l.* By a deed of the 6th of March 1783, after reciting the assignment of [illegible] January 1779, James Grant assigned Peter Grant's legacy to Alexander Grant, the plaintiff's father, and the interest due thereon, and the assignment thereof of the 2d of January 1779. In the month of December 1782, Charles Grant, the defendant, purchased from James Charles Sholto Douglas, an estate called Hopewell, in Jamaica, for 50,000*l.*; and Charles Grant prevailed on Peter Grant (they being then both resident in Jamaica) to join with him in executing five bonds to Douglas, in penalties amounting to 22,330*l.* 6*s.* 2*d.*, for the purpose of securing 10,000*l.*, part of the purchase money, and interest at 6 per cent. And by an indenture of December 1782, Charles Grant, and Peter Grant, both in his own right, and as the attorney for his brother James Grant, assigned, to Douglas, the three legacies, subject to redemption on payment of the money that was secured by the bonds. In April 1783, James Grant and Peter Grant respectively became bankrupts. The same persons were the assignees under both commissions; but they were not made parties to the suit after mentioned. In July 1783, and before the bonds were payable, Mr. Douglas, at the request of Charles Grant, filed a bill in the court of Chancery in Jamaica, against the executors of the testator and against Charles, Peter, and James Grant, in order to enforce payment of the legacies in part satisfaction of the bonds. In September 1783, Mr Douglas died, and the suit was revived by G. Cuthbert, John Fergusson, and William Ross, his executors; and on the 21st of May 1788, the cause was heard and a decree was made, referring it to the Master to take an account of what was due on the legacies, and of the real and personal estates of the testator, Sir A. Grant but no account was directed of the other legacies given by the testator, or of his debts. The Master made a separate report of what was due on the legacies, on the 11th of May 1789, by which it appeared that there was due, for principal and interest, 3,898*l.* 1*s.* 6*d.* to James Grant, 5,050*l.* to Peter Grant, and 2,966*l.* 13*s.* 4*d.* to Charles Grant, making altogether 11,914*l.* 14*s.* 10*d.* due in respect of the legacies. James Grant had obtained his certificate in June 1783.

On the 19th of February 1793, the Master made his general report in the cause, by which he found that there was a very large balance in the hands of the executors amounting to 208,605*l.* 8*s.* 2*d.* currency; and that report was confirmed, by an order of the 25th of April 1793, from which, however, there was an appeal to the King in council, and the order was affirmed. In April 1790, James Grant paid, to Inglas & Russel, the sums secured by the assignments of the two sums of 750*l.* and 750*l.*, portions of his legacy, and those were then reassigned to him.

Sir Ludovick Grant died in the year 1790, and thereupon Alexander Grant, his eldest son became Sir Alexander Grant, and the heir-at-law and next heir of entail to the testator, and consequently he became entitled to the residue of the testator's real and personal estates, subject to the payment of his debts and legacies.

In December 1792, Sir Alexander Grant, contracted with Mr Ross, the surviving executor of Mr Douglas, for the purchase of the debt of 10,000*l.*; and, by an indenture of 17th December 1792, the bonds and

legacies were assigned by Mr Ross to Alexander Lindo, in trust for Sir Alexander Grant, upon payment to Ross of the consideration money. In February 1793, actions were brought, on the bonds, in Jamaica, in the name of Lindo, against Charles Grant; and on the 3d of May 1793, Charles Grant filed a bill in the court of Chancery, in Jamaica, against Sir Alexander Grant, Lindo and Ross, and against the executors of Sir Alexander Grant, the testator, and against Peter Grant, praying that the assignment to Lindo might be declared fraudulent, and that the legacies of Charles Grant, Peter Grant and James Grant, might be deemed a payment, so far as the same would extend, of the bonds of Charles and Peter Grant, and that Ross and Lindo might be decreed to resort, for payment of the legacies, to the estate alone of the testator: and that it might be declared that Charles Grant ought to have the amount due on the legacies applied in reduction of the bonds, and that Sir Alexander Grant and Lindo might be directed to deliver up or cancel the said bonds (Charles Grant offering to pay any balance that should appear due after applying the amount of the legacies as aforesaid) and that it might be referred to the Master to take an account of what was due on the bonds, and that, on the coming in of the report, and on Charles Grant paying into court the difference between the amount of the legacies and of the bonds, Sir Alexander Grant or Lindo might be directed to deliver up or cancel the bonds; and that, in the meantime, Sir Alexander Grant, Lindo and Ross might be restrained from disposing of the bonds and legacies, and from taking any steps, at law, by virtue of the assignment, and also from proceeding at law with any action on the bonds.

On the 25th of January 1794, an injunction was granted to restrain Sir Alexander Grant, Ross and Lindo from disposing of the bonds and proceeding, at law, against Charles Grant, upon the same. From that order there was an appeal to his Majesty in council, and, on the 1st of May 1799, the order of the court below was affirmed, and Charles Grant was directed to account for all moneys received for or on account of the testator, or the legacies given by his will. On the 7th of April 1800, James Grant, together with the assignees under the commissions against him and Peter Grant, filed a bill in Jamaica against Charles Grant, against the executors of Sir Alexander Grant, the testator, and against Sir Alexander Grant, Peter Grant and Lindo, praying that Charles Grant might be decreed to pay, the amount due from him on the bonds, to Sir Alexander Grant, so as to exonerate the legacies given to Peter and James Grant, and that those legacies might be paid to the assignees, out of the estates of the testator, and that an account might be taken of the real and personal estates of the testator, and of his debts and legacies. On the 2d of February 1807, a decree was pronounced, in this suit, by which it was ordered that Charles Grant should, on or before the 31st of July then next, pay to Sir Alexander Grant, the sum of 2,315*l.* 13*s.* 9*d.*, being the balance of the legacy bequeathed to James Grant, and reported due in the suit instituted by Douglas, with interest at 5 per cent., and also the 3,000*l.* bequeathed to Peter Grant, with interest, in part payment of the bonds, and that thereby the legacies bequeathed to James and Peter Grant should be exonerated from the assignment of December 1782; and it was further decreed that Sir A. Grant should, out of the estate of the testator,

which had come to his hands, pay, to James Grant, the two sums of 750*l.* each, on or before the 31st of July then next, with interest, from the 30th of April 1790; and that Sir A. Grant should pay, to the assignees of James and Peter Grant, the residue of James Grant's legacy, and also the legacy bequeathed to Peter Grant with interest.

Charles Grant and Sir Alexander Grant both appealed to the king in council from that decree: and, by an order dated the 12th of June 1809, the decree of the 2d February 1807, was reversed; and, in lieu of what had been decreed by the court below, it was decreed that it should be referred to the Master to compute subsequent interest, on the legacies to Peter and James Grant, from the foot of the report in the suit instituted by Douglas; and that, in respect of the benefit which the assignees of Peter and James Grant had derived from the accounts of the testator's estate having been taken, and the amount of what was due on the legacies to Peter and James Grant having been ascertained, in the said suit, they ought to allow, to the appellant Charles Grant, a reasonable proportion of the costs and charges and expences incurred by him in such suit: and that the Master should settle and ascertain such proportion: and that Charles Grant should be at liberty to deduct the same out of what should appear to be due on the legacies to Peter and James Grant: and that Charles Grant should pay, to Sir Alexander Grant, the residue of what should be found due on the legacies, in part payment of the bonds executed by Charles Grant and Peter Grant, to Douglas, and assigned to Lindo in trust for Sir Alexander Grant: and that Sir Alexander Grant should, out of what he should receive, pay, to James Grant, what should be ascertained to be due to him in respect of the two sums of 750*l.* each, part of the legacy bequeathed to James Grant; and that Sir Alexander Grant should pay, the residue of what he should have so received, to the assignees of the estates of Peter Grant and James Grant.

In pursuance of this order, the Master made a report dated the 14th of January 1811, and thereby certified that there was due, on the legacy to Peter Grant, up to 1st December 1810, 8,300*l.*, and on the legacy to James Grant, up to the same day, 6,406*l.* 14*s.* 8½*d.*, and the Master allowed, to Charles Grant, for his proportion of the costs, 1,953*l.* 1*s.* 7*d.* Charles Grant excepted to this report; and those exceptions were overruled and the report confirmed, by an order of the court in Jamaica, on the 16th of September 1811. From that order, Charles Grant appealed to the king in council, and, on the 16th of April 1818, that order was confirmed. On the 11th of February 1819, Charles Grant, in pursuance of the order of the 12th of June 1809, paid the balance due in respect of the legacies of Peter and Charles Grant, after deducting what the Master had allowed him for costs, and thereupon the legacies of James and Peter Grant were assigned to Sir A. Grant, by the personal representatives of James Grant, and the assignees of James and Peter Grant; and Sir Alexander Grant gave, to Charles Grant, a receipt for 16,884*l.*, being the amount of what the Master had found due in respect of the legacies, with subsequent interest thereon.

On the 24th of July 1825, Sir Alexander Grant died, and the plaintiff, Sir Alexander Cray Grant became his administrator with the will annexed.

On the 11th of January 1827, the bill in this cause was filed, by Sir

[Grant *v.* Grant,]

Alexander Cray Grant, the representatives of Douglas and the representatives of Lindo against Charles Grant.

The bill was amended in August 1827: it charged that, although it appeared, by the Master's report in the suit instituted by Douglas, that assets of the testator amounting to 208,605*l.* 8*s.* 2*d.* currency had come to the hands of the executors and trustees of the testator, the report was fallacious, and was stated and taken *ex parte*, and was framed upon the estimated value or supposed produce of the testator's property, and not according to the actual receipts and payments, of the executors and trustees: and that the Master had never seen the accounts of the executors and trustees, who were all resident in Great Britain, and therefore could not form a correct estimate of the outgoings on the sales of produce in England, or of the prices at which such sales were effected, or of the cost of supplies sent out to the estates, and that the Master had never seen any account of the payments made by the executors and trustees, in dischage of the testator's debts, or of their other disbursments in the administration of his estate: that the decree in that suit was defective, as it did not direct any account to be taken of the testator's debts, funeral and testamentary expenses or legacies: that Charles Grant solicited and prevailed on Douglas to institute the suit: that the proceedings in the before-mentioned suits were, from time to time, protracted by Charles Grant; and that the final settlement of the matters in dispute, in the suit commenced in 1800, was delayed by various proceedings by C. Grant: that, on the 2d of December 1818, 36 years interest was due on the bonds, amounting to 21,600*l.*: that the 16,884*l.* paid by C. Grant ought to be applied in reduction of the interest on the bonds, and not of the principal, leaving the bonds, securities for the principal 10,000*l.*, and a balance of interest of 4,716*l.* and upwards: that the bonds were lost, and that C. Grant was about to quit the kingdom. The bill prayed that an account might be taken of all the sums of money then due and owing for principal and interest in respect of the bonds, and that the defendant, Charles Grant, might be decreed to pay, to the plaintiff, Sir Alexander Cray Grant, as such administrator as aforesaid, what might be found due on the taking of the account, and that the defendant, Charles Grant, might be decreed to give security, to be approved of by one of the Masters, in order to secure to the plaintiff, as such administrator, the moneys due and owing in respect of the bonds; and that a writ of *ne exeat regno* might be issued against the defendant, who was then about to leave the kingdom, and that it might be marked for the sum of 13,000*l.*

The writ of *ne exeat*, marked for 13,000*l.* was issued against the defendant on the 12th of January 1827; but afterwards it was ordered to be marked for 6,500*l.**

The chief question in the cause, was whether the plaintiff's claim in respect of the 10,000*l.* and interest was or not to be limited to the amount of the penalties of the bonds.

The Solicitor-General and Mr M'Arthur, for the plaintiff:

It was a fraud, on the part of Charles Grant, in the legal sense of the word, to procure Douglas to file a bill against the persons representing

* See 3 Russ. 598.

the estate of the testator, the object of which was to bring the legacies, given to Peter and James Grant, in liquidation of his own obligations; and it is clear that, instead of having a right to their legacies, he was bound, as between them, to relieve their legacies from the obligations of his debts. In that suit a decree was afterwards made: and which, without directing any account of the debts and testamentary and funeral expenses, &c. of the testator, without directing a general account of the debts and legacies, merely directed an account to be taken of what was due to Peter, Charles and James Grant, in respect of their legacies, and directed an account to be taken of the estate of the testator. The Master made a report, by which he found what was due in respect of those three legacies, and he found a very large amount of money to belong to the estate of the testator. Now as the Master was directed to inquire merely what estate there was, without inquiring what the debts and liabilities were, that account was a mere nullity upon the face of it.

Mr Douglas who had obtained the five bonds, and also an assignment of the legacies, had a right to go against any part of the assets. He sold to Alexander Grant the full sum then due to him, with all the securities to which he was entitled, and they were all assigned to Lindo, in trust for Sir Alexander Grant. The effect was, to place Alexander Grant in the place of Douglas, and to give to him all the rights, and to subject him to all the liabilities to which Douglas was subject. Sir Alexander Grant, therefore, might either prosecute the suit or not, as he pleased; because, as he had the full benefit of the claim against the original debtor and against his sureties, he was at liberty to abandon the suit and pursue the remedy against the principal. Charles Grant has no right to complain that the payment of the legacies was not enforced in the suit commenced by Douglas. For he ought, in equity, rather to have interfered to prevent it. The principal debtor can not complain that the payment of the debt has not been enforced against the surety. The suit being imperfect in its commencement, Sir Alexander Grant never could have prosecuted it with advantage, and there was no obligation upon him to prosecute it. Charles Grant filed a bill in Jamaica, in 1793, in which his object was to impeach the assignment to Lindo, as fraudulent; and he obtained an injunction. It is difficult to discover upon what ground he could have been entitled to that injunction; however he obtained it, and against the order for that injunction there was an appeal to the king in council; but the injunction was continued with the direction that Charles Grant should, himself, account for all moneys he had received in respect of the estate of the testator: for Charles Grant himself had acted, for a considerable period, as the agent of the trustees and executors of Sir Alexander Grant in the administration of the estate in the West Indies. The third suit was filed in 1800: and the decree made in it, directed that Charles Grant should pay certain sums so as to relieve the legacies from the obligations they were under to pay the bonds; and that decree also directed that Sir Alexander Grant, should, out of the assets of the testator, pay, to James Grant and the assignees of Peter and James Grant, what should be due upon their legacies. Against that decree Sir Alexander Grant very properly appealed, because it directed him

to pay the legacies, although Charles Grant might not, in the first instance, have paid to him that which was equivalent to them in amount. Although he was bound, as then representing the testator's estate, to pay those legacies, yet, those legacies were dedicated to the payment of the debt due to him, consequently, if he was to pay with one hand, he was to receive with the other. But under this decree he might have been compelled to pay the legacies, and he might not receive, the amount of them, from Charles Grant. The result was that this decree was reversed in 1809. Upon the order then made, the rights of the parties depended from the moment it was pronounced, and the whole of the delay that has arisen from that time, rests with Charles Grant. It was not until February 1819, that payments were made by him in liquidation of what was due upon the bonds. The sums then paid were less than the interest due on the bonds. Consequently the payments must be applied in liquidation of the interest; and the whole principal sum originally due to Douglas, must still continue to carry interest. Thomas *v.* Montgomery, 2 Sim. Rep. 348.

The defendant, in his answer, says that, as it appeared, by the report made in Douglas's suit, that there was then a large amount of assets, the legacies ought to have been paid, at that period, and that, attributing those payments to the satisfaction of the bonds, very little would remain due. But as no account of debts was taken in that suit, it does not appear what was the charge upon the assets: and, therefore, there is nothing to show that there was, at that period, a fund for payment of the legacies.

But admitting, for the sake of the argument, that, at the period in question, there were assets to pay the legacies in dispute; still those legacies did not belong to Charles, but to James and Peter Grant. The debt for which they were assigned as a security, belonged to Sir Alexander Grant: he was liable to pay the legacies not out of his own property, but out of the testator's assets: and Charles Grant was seeking to apply moneys belonging to other persons, in satisfaction of his own debt. Whilst Charles Grant is contending, by his answer in this cause, that the legacies belonging to Peter and James Grant, or their assignees, should have been attributed, in 1792, to pay his debt due to Sir A. Grant, he himself, by the decree of the court in Jamaica, followed up by the order of the privy council, is compelled, in 1819, to pay those very legacies, out of his own funds, which, as he says, were to be considered as his property in 1792. So far from his having a right to set off the legacies of James and Peter in satisfaction of the debt contracted with Douglas, Charles Grant was, in the result, forced to pay so much of the debt as would exonerate those legacies. Before a right of set-off can arise, it must be shown that the party claiming the right, is entitled to the property which is to be set off: but the decree in Jamaica, and the order of the privy council, have established the liability of C. Grant, not to let his debt fall upon James and Peter's legacies, but upon himself, and to exonerate them. This would have been the case, if James and Peter had remained solvent; but the case is still stronger when their bankruptcy is taken into consideration. The moment that they became bankrupts, their legacies vested in their assignees, and the assignees had an equity to have the legacies exonerated from the liabi-

lities which had been imposed on them. This distinction can never be lost sight of, namely, that though Mr Douglas had a right to go against either, yet as between Charles, on the one hand, and James and Peter on the other, there was an obligation on Charles to exonerate the legacies, and pay the debt himself. Besides, no right of set-off could exist in this case, because Sir Alexander Grant was not bound to pay the legacies, personally, but out of the assets of the testator.

The defendant then says that the plaintiff's demand must be limited to the amount of the penalties of the bonds. Here there was an existing debt which carried interest; for a purchaser must always pay interest on his purchase-money remaining unpaid, from the moment that he is let into possession of the estate: and as, in this case, a bond was given and legacies were assigned as securities for the debt, can it be said that the debt will cease to carry interest when it amounts to as much as the penalty of the bond? Is there any contract for stopping the interest? Can the security which the creditor has received, stop the currency of the interest which belonged to the debt by its very nature? When a party recovers on a bond, at law, he is, of course, bound by the penalty. So in the administration of assets in this court, a party coming in, as a bond-creditor, can not go beyond the penalty: but, not so, if he comes in a different character, and asks, generally, to be paid his debt. Here it is perfectly immaterial whether there were bonds or not. Suppose that Charles Grant had given no bonds, as the debt, in its nature, carried interest, it would have continued to do so, until it was satisfied. It was quite unimportant whether bonds were given for it, or not. Clarke *v.* Lord Abingdon, 17 Ves. 106.

This would have been the case if the claim of the plaintiff Sir A. Cray Grant, had rested simply upon the ground upon which it has been put. But, as the legacies were assigned, as a collateral security, not for the bonds, but for the 10,000*l.* and interest; the payments which were made in 1819, and which were attributable to the legacies, and which were handed over to the legatees, must go to the extinction of that portion of the debt, which would not be covered by the bonds, and the creditor must be left at liberty to recover what remained due on the bonds.

Besides, this court never allows a debtor to take advantage of the limited amount of the penalty, where he has, himself, caused delay, and prevented the receipt of the debt. Pulteny *v.* Warren, 6 Ves. 73; Duvall *v.* Terrey, Show. P. C. 15; Atkinson *v.* Atkinson, 1 Ball & Beat. 238; O'Donel *v.* Browne, ibid, 262; Grant *v.* Grant, 3 Russ. 598; Godfrey *v.* Watson, 3 Atk. 517; Selwin *v.* Brown, 4 Bro. P. C. ed. Toml. 517; Lord Dunsany *v.* Plunkett, 3 Bro. P. C. ed. Toml. 607; Bond *v.* Hopkins, 1 Scho. & Lef. 413. Now, Charles Grant obtained an injunction in the second suit, which prevented the debt from being recovered from him, at law. Next, he ought, immediately after the order of 1809 was pronounced, to have paid the debt; but he did not pay it till 1819. It can not, therefore, be disputed that, from 1809 till 1819, the whole delay rested with him.

Upon all these grounds we submit that the plaintiff is entitled to a decree for the whole sum that remains due, and to a direction for the computation of interest upon that sum. The defendant is, of course, entitled to set off his own legacy of 2,000*l.*, from the year 1792, and to

have credit for the sums which he paid in 1819. But the interest then due was more than the whole amount paid; the consequence of which is that the account must still go on, with the interest calculated upon the whole sum due.

Mr Horne, Mr Knight, and Mr Burge, for the defendant:

The amended record was not before Lord Eldon when he granted the writ of *ne exeat:* and that, being a mere interlocutory proceeding, can not affect the ultimate decision of his suit. This bill does not seek to set aside proceedings in any other court, for fraud; and where that is not the object of the suit, this court is bound by every decision, of a court of competent jurisdiction, between the parties. This court, therefore, can not proceed, in this suit, in a manner inconsistent with the proceedings unappealed from in the court of Chancery in Jamaica, and much less in a manner inconsistent with the decisions of the privy council. The report of 1793 is the only proceeding with respect to which any degree of impropriety is alleged: that report, however, was confirmed, on appeal, by the privy council, and every order that was subsequently made proceeded on the ground that there were clear assets in the hands of Sir A. Grant. If an account is directed to be taken, and the charge is established, and the adverse party refuse to bring in his discharge, can he afterwards say that he was not bound by the report?

The order for an injunction, which had been obtained by Charles Grant, was appealed from and confirmed, with a direction, not that Sir A. Grant should account, for he was considered to be conclusively fixed by the proceedings that had taken place, but that Chsrles Grant should account for what he had received.

In the decree made in the suit instituted in 1800, the proceedings in the cause of Douglas *v.* Grant are referred to and adopted. That decree was reversed, or rather varied, by the privy council in 1809; and the order made upon that occasion proves, conclusively, that there were assets to pay the legacies: for it directs payment to be made of what should be found due on account of the legacies. That would not have been directed, if there had not been assets to pay the legacies: for legacies, without assets to pay them, are actually nothing.

The Vice-Chancellor:—There was no payment actually made till 1819.

Argument for the defendant continued:—In the proceedings that have taken place in the courts in Jamaica and in this country, it was originally decided, and all along, taken for granted that Sir A. Grant was personally chargeable with these legacies.

In 1819 the amount due for principal and interest, exceeded the penalties of the bonds. In 1819, payments exceeding 16,000*l.* were made by Charles Grant. Now is there any case where, under such circumstances, payments have been attributed to the reduction of the interest so as to bring the debt below the penalty, and to change the rights of the parties, the amount of the debt being fixed by the penalty. When the 16,000*l.* were paid, the amount due in respect of Charles Grant's own legacy, exceeded the difference between that sum and the penalties of the bonds: so that when the payments were made in 1819, the penalties had been exceeded. Such being the case, the Plaintiff, Sir A. Cray Grant has been overpaid, and the bill ought to be dismissed.

It has never been suggested, throughout any of these proceedings, (and, of course, it forms no part of the case) that there was any lien, on the Hopewell estate, in respect of the original debt. If then a bond be given for purchase-money, without a lien, can it be said that the original debt remains? If there had been any lien, it might have preserved the original debt, as a debt carrying interest; but there being none, the debt is simply a bond-debt. Does then the assignment of the legacies, make the debt carry interest more extensively than it would otherwise have done? It has been decided that the mere circumstance of having a bond, does not prevent a creditor from proceeding, against property charged with a debt, to the full extent of his principal and interest. Therefore, if the receipts given, by Sir Alexander Grant to Charles Grant, in 1819, had been expressed differently from what they were, there might have been some ground for contending that the plaintiff, Sir A. Grant, was entitled to carry his demand beyond the amount of the penalties. But the receipts were given, expressly, for so much due on the bonds, and not in respect of the assignment of the legacies; and, such being the case, the bonds were satisfied. The language used by Sir W. Grant, M. R., in Clarke *v.* Lord Abingdon, is: "In this case the creditor has two securities; one by bond, the other by mortgage. If he sues upon the former, he can not have interest beyond the penalty," 17 Ves. 109. The prayer of this bill shows that it is a suit upon the bonds exclusively. The payments were made, expressly, on account of the amount due on the bonds, and that amount was then the penalties only.

Then it was argued that, by reason of some alleged misconduct or delay, on the part of C. Grant, the interest ought to go beyond the penalties. The injunction that he obtained was decided, by the court of appeal, to have been properly obtained; and the plaintiff never attempted to get rid of it. Charles Grant, when he obtained the injunction, was not vexatiously endeavouring to delay Sir A. Grant from procuring payment of his debt, but was only protecting himself from being compelled to pay what ought not to have been demanded of him. There have been cases where, under very peculiar circumstances, interest has been given beyond the penalty of a bond. But it has never been done for a plaintiff, but only for a defendant who has been delayed by a plaintiff. Sir A. Cray Grant, who is plaintiff in this suit, might have had the privileges of a defendant, if he has chosen to go in the West Indian suits: but he can not, by electing to become plaintiff here, change the nature of the case.

If the court shall think fit to direct an account, it must be done with such declarations as will satisfy the justice of the case: but, if the court shall be of opinion, that the debt has been satisfied, as we submit is the case, then the bill must be dismissed.

The Solicitor-General, in reply:

It has been argued that the assignments of the legacies to Mr Douglas, gave him a title to enforce the payment of them; and that, therefore, the first suit was properly instituted. That suit was instituted at the request of Charles Grant. Had there been assets, he would have had a right to compel payment of his own legacy through the medium of Douglas. But he had no right to instigate Douglas to get possession

of the legacies of his brothers, not for the purpose of paying them, but of reducing the debt which he owed to Douglas: nor was it the duty of Douglas to enforce payment of the legacies of Peter and James, to liquidate Charles's debt: and Peter and James never complained that Douglas did not get in their legacies. Supposing that there had been assets, and that James and Peter had resorted to them, the result would have been that they would have received the amount of their legacies, and that Charles would have had to pay just as much as they received. If Douglas had enforced payment of the legacies, Charles would have only changed his creditor: for then his brothers would have stood in the situation of Douglas, to the extent of their legacies, and he would not have received a shilling less: no wrong, therefore, has been done to him. It ought not to be forgotten that neither Inglis nor Russell, nor the assignees under the commissions of bankruptcy, were parties to the first suit; therefore, no decree could have been made in it which would have bound those persons: and yet it is insisted that, in this collusive suit, the legacies which belonged to those absent parties, and not to the brothers, ought to have been disposed of.

Then it was said that an injunction was obtained, by Charles Grant, in the second suit; that the order for that injunction was affirmed by the privy council, and that this court has no jurisdiction to impeach what has been done by the court of appeal. I admit that it has no such jurisdiction; but what has become of that second suit? All the defendants to it are dead, and therefore it is abated. In the next place, every thing that was done in that cause has been put an end to, by a later decision, of the same supreme court of appeal, between the same parties. If an injunction were subsisting which prevented Sir A. Grant from recovering a shilling of his demand, how did it happen that, in 1819, Charles Grant paid 16,000*l.* and upwards in part satisfaction of the bond-debts.

Next as to the third suit. There we no longer find Charles Grant claiming his brother's legacies, but James and the assignees under the commissions praying that the legacies may be paid to them. Now if Charles Grant had, as was contended by the other side, a right to enforce payment of the legacies, the bill would have been dismissed; but, instead of that, Charles was ordered to exonerate the legacies from the liabilities imposed upon them for his benefit; and, instead of taking the legacies in satisfaction of his own demand, he was bound to let them be received by his brothers. The court, therefore, disregarded the injunction that was granted in the second suit.

It was said that, until the principal and interest due on a bond, reaches the penalty, the creditor has a right to attribute payments made to him, to the reduction of the interest: but that that right ceases as soon as the aggregate sum due reaches the penalty. No authority, however, was cited for that doctrine, and your honor's decision in Thomas *v.* Montgomery, is an authority to the contrary. So, also, if a judgment be recovered on a bond, the creditor is allowed interest on his debt, without regard to the amount of the penalty. If a mortgage is given for an uncertain sum, with a proviso that it shall not be a security for more than 3,000*l.*, if that sum becomes due and is repaid several times, but, at last, there is 3,000*l.* due, still the mortgage is a security for that sum. This proves that a security will accommodate itself to

the dealing between the parties, and will, at last, stand as a security for the money that shall be found due. Again, if there be a mortgage for 3,000*l.*, and there is 10,000*l.* due from the mortgagor to the mortgagee, and he pay off 7,000*l.*, still the mortgage will be a security for the 3,000*l.*

As Sir Alexander Grant stood in the place of Douglas, his debt carried interest from its very nature; for as it was due in respect of the purchase-money for an estate, of which Charles Grant was in possession, Sir A. C. Grant has a right to recover in respect of his original debt, without reference to the bond.

Supposing, however, that the plaintiff has no right to demand, under the bonds, more than the penalties, he must then call the securities on the legacies in aid; and they must, of course, be first applied in satisfaction of that part of the demand, which would not be covered by the bonds; and, according to the defendant's own view, in Douglas's suit, the legacies were applicable to the payment of the plaintiff's demand; and the remainder would be recoverable under the bonds.

Lastly, as to the delay. In 1809, the rights of the parties were solemnly decided by the privy council. The obligation which was then imposed upon Charles Grant was not performed until 1819. In that year he paid interest on account of the delay of payment; and upon the same principle he ought to pay interest for the remainder of the debt. According to the decision of the house of lords, in Duvall *v.* Terrey, a debtor who has delayed his creditor, shall not have the benefit of the rule which, in other cases, limits the debt to be recovered, to the amount of the penalty.

The Vice-Chancellor, after stating the facts of the case, and reading the prayer of the bill, proceeded as follows:

The defendant, Charles Grant, by his answer, states that he has always been willing to come to a fair account with the plaintiff, and that he had been prevented from so doing only by the unreasonable demands of the plaintiff. So that this is, clearly, a case for an account. Lord Eldon, in the case of Pulteney *v.* Warren, 6 Ves. 79, speaking of Duvall *v.* Terrey, Show, P. C. 15, says: "The decree for principal and interest beyond the penalty of the bond, was affirmed upon the very ground that the party was prevented from going on, at law, while the demand was under the penalty." That is the way in which Lord Eldon represents the case; and it is, in substance, a true representation of it; and he applied the principle of that case to the circumstances of the case of Pulteney *v.* Warren, which arose on the ground of the conduct adopted by Warren, one of the lessees on the Pulteney estate; and he gave an account, which was extended far beyond the time it would have been continued to, but for the conduct of Warren. The same principle seems to have been adopted in Clarke *v.* Lord Abingdon, 17 Ves. 106, and the other cases which were mentioned at the bar; all of which go to support the principle which is merely founded on this, that, if a party chooses, by improper proceedings, to prevent a creditor from having payment as soon as the creditor ought, those proceedings shall not operate to the prejudice of the creditor; but he shall be considered as entitled to receive what is really the amount due to him; and, notwith-

standing there is a form of penalty in the bond, that shall not be the limitation of what shall be recovered by him.

Now, it appears that the first suit was instituted at the request of Charles Grant, the defendant; and it is obvious that that was not a fair suit; because the apparent object of the suit was, for the benefit of Charles Grant, to throw, upon Peter and James Grant, who assigned their legacies merely as a security, the *onus* of paying the debt of Charles Grant, to the extent of their legacies. Then it appears that, when Sir Alexander Grant, the father of the present plaintiff, died, he had commenced his action at law for the purpose of obtaining what was due to him on the bonds, and Charles Grant, himself, instituted a suit, and obtained an injunction, by which all proceedings on the bonds were effectually staid. He, therefore, has actively interfered to prevent the creditor from recovering what was due to him; and it was not, till the third suit was commenced, in 1800, that any proper steps were taken for throwing the burden of payment where it ought to fall, as between the different legatees.

Now there is no mode of considering the case by which it can be held that the legacies of Peter and James Grant were ever applied to satisfy any portion of the debt, till the month of February 1819; and it appears, upon adverting to the proceedings in this third suit, that, notwithstanding the order was made in June 1809, (which directed payment to be made in a given manner), when the master made his report, exceptions were taken, and then followed an appeal, which was not concluded till 1818; and all this was caused by the conduct of Charles Grant.

It is quite clear, therefore, that Charles Grant, himself, was the sole cause why, up to February 1819, the legacies had not been applied to the payment of the bond-debt, as they clearly ought to have been.

My opinion, therefore, is, in this state of facts, that I am bound, by the principle established by the cases I have alluded to, to say that there must be an account taken of the principal and interest, which must be carried down to the time of the report: and the consequence is that those sums of money which have been applied, as the receipts show, in satisfaction, *pro tanto*, of the principal and interest secured on the bonds, must first be applied to the liquidation of the interest, and then in discharge of the principal, if the payments that were made did extend beyond the interest.

The principle upon which I proceed in making this decree, has been recognized by the very proceeding taken in the cause, I mean, by the adoption and preservation of the writ of *ne exeat regno*, which my Lord Eldon granted, after the discussion before him; because, as it appears to me, Lord Eldon could not, on any other principle, have granted the writ for 13,000*l.*, and afterwards have reduced it to 6,500*l.* And his lordship, speaking of the doctrine of *ne exeat*, in the case of Morris *v.* M'Neil, 2 Russ. 605, says: "The facts of this case, and the transactions between the parties, do not go that length which authorizes me to say that I can not have a rational doubt whether there shall or shall not be a specific performance of the contract; and, unless the court can make it out to be quite clear that there must be a specific performance, it can not grant the writ of *ne exeat regno*."

Now, applying that principle to this case, I conceive that Lord

Eldon, when he afterwards allowed the writ of *ne exeat regno* to be reduced to 6,500*l.* must have considered that, on taking the account, there would, at all events, be 6,500*l.* due. I can not see how that sum can be due, except on the adoption of the principle which I have acted on. Therefore an account must be taken upon the principle I have mentioned, that is, computing principal and interest upon the bonds, up to the time of making the report.

"This court doth declare that, under the circumstances of this case, the plaintiff, Sir Alexander Cray Grant, as the administrator with the will annexed of his late father, Sir Alexander Grant, deceased, is entitled to an account of the principal and interest due on the five bonds in the pleadings of this cause mentioned, without being limited, in the taking of such account, to the amount of the penalties of the said bonds: And this court doth order and decree that it be referred to the Master of this court in rotation, to take such account accordingly, and, in the taking of such account, it is ordered that the sum of 16,884*l.* paid, by the defendant, on the 11th day of February 1819, on account of the moneys secured by the said bonds, be applied, first in payment of the interest then due on the said bonds, and, if any surplus of the said sum of 16,884*l.* shall remain after satisfying such interest, then in payment, *pro tanto*, of the principal sum secured by the said bonds: And it is ordered that the said Master do also take an account of what is due, for principal and interest of the legacy of 2,000*l.* bequeathed, to the defendant Charles Grant, by the will of Sir Alexander Grant, the testator in the pleadings of this cause named: And this court doth declare that, what the Master shall find to be due for principal and interest of the said legacy, ought to be set off against what he shall so as aforesaid find to be due for principal and interest on the said five bonds: And it is ordered that the said Master do make such set-off accordingly, and state the balance that will remain due, in respect of the principal and interest of the said five bonds, after such set-off. And it is ordered that what the said Master shall certify to be the amount of such balance, be paid, by the said defendant Charles Grant, to the plaintiff Sir Alexander Cray Grant, as such administrator as aforesaid."

## Mackworth *v.* Marshall.

3 *Simons*, 368.

Bill to have acceptances fraudulently obtained from the plaintiff, by one of the defendants, and which were in possession of the other defendant, but who claimed no interest in them, delivered up to be cancelled. The former defendant pleaded his bankruptcy under a commission issued after the filing of the bill. Plea over-ruled.

A defendant who had taken out three orders for time to answer, and then pleaded, refused further time, on the plea being over-ruled.

February 10, 1330.

THE plaintiff was a young man of the age of 23, who had recently left the university, where he had contracted some debts; and, with a

view to raise money to discharge them, he, in consequence of an advertisement which he had seen in the newspapers, applied, to the defendant Marshall, to lend him 300*l.* and Marshall promised to advance him the sum required. In the course of the interviews, that took place between them, in September and October 1829, Marshall prevailed upon the plaintiff to accept several bills of exchange, one of which was for 3,000*l.* and two others for 200*l.* each; but he never advanced any money to the plaintiff, or gave him any valuable consideration for the acceptances. Marshall endorsed and delivered the three bills to the other defendants, Messrs Nevill, in whose hands they were when the bill was filed.

The bill, which was filed on the 16th October 1829, charged that the acceptance had been obtained, from the plaintiff, under circumstances of fraud and misrepresentation, and that Messrs Nevill had received the bills, not in the ordinary course of business, without consideration, and with notice of the circumstances under which the plaintiff had accepted them; and that Messrs Nevill, upon being applied to, on the plaintiff's behalf, had admitted that they had no claim on the two bills for 200*l.* each, and said that they should return them to Marshall. The bill prayed that all the bills of exchange accepted by the plaintiff under the circumstances stated, might be delivered up to be cancelled, and that the defendants might be restrained from negociating or making any use of them, and from suing the plaintiff upon them.

Marshall pleaded a commission of bankrupt, issued against him on the 28th November 1829, upon the petition of one Bayley.

Mr Wakefield, for the defendant, Marshall, in support of the plea.

The Solicitor-General and Mr James Russell, for the plaintiff, in support of the bill:

The bill states a case of gross fraud against the defendant Marshall. It is his personal conduct and personal liability that makes him a necessary party to the bill. How is he delivered, from any liabilities he has incurred, by his having become bankrupt? If he had been a mere accessory to the fraud, or a mere agent in perpetrating it, and had not acquired any advantage to himself, he would have been a necessary party. King *v.* Martin, 2 Ves. jun. 641, Monteith *v.* Taylor, 9 Ves. 615, Whitworth *v.* Davis*.

The Vice-Chancellor. The object of the plaintiff was to borrow money. The effect of what has taken place is to make him liable for large sums.

There is some degree of uncertainty, in the statements in the bill, as to in whose possession the bills of exchange now are. But it appears that two of them, at least, are in possession of the Nevills, and that they claim no interest in them. The plaintiff would, therefore, have a right to have those delivered up, except from any claim which Marshall may have upon them. Marshall is, therefore, a necessary party to suit, in respect of these bills. The plea of his bankruptcy therefore, is not a sufficient plea to this bill.

* 1 Ves. & Beam. 545, and see Turner *v.* Robinson, 1 Sim. & Stu. 3.

[Mackworth *v.* Marshall.]

The defendant having taken out three orders for time to answer before he put in his plea, the Vice-Chancellor, upon the plea being overruled, refused to allow him any further time for answering.

## Carter *v.* Anderson.

3 *Simons*, 370.

A married woman being entitled to an annuity charged on an estate belonging to A., but of which her husband was, as she knew, in receipt of the rents, under a power of attorney from A., made no demand upon A. in respect of the annuity, for several years. The husband being indebted to A. in respect of his receipts, becomes bankrupt. Held that, as the wife had lived with her husband, and enjoyed the benefit of his expenditure, she had no claim, upon A. or his estate, in respect of the arrears of the annuity.

February 10, 1830.

UNDER the will of Duncan Anderson, deceased, the plaintiff, Catharine Carter, the wife of the defendant, William Carter, who had become bankrupt, was entitled, for her separate use, to an annuity of 500*l.* Jamaica currency, charged upon the testator's estates in Jamaica, and subject thereto, those estates were devised and bequeathed, to Robert Anderson, then an infant, absolutely. The testator died in October 1793. The plaintiff's annuity was paid to her, during the minority of Robert Anderson, by the testator's executor in Jamacia, out of the rents of his estates in that island.

On the 14th of June 1812, Robert Anderson came of age. The bill, after stating that W. Carter had lately become bankrupt, alleged that the plaintiff's annuity had not been paid since R. Anderson had come of age; and it prayed that an account might be taken of the arrears, and that the amount found due might be paid out of the proceeds of the Jamaica estates.

It having been referred to the Master, to enquire and state whether anything, that was due, to the plaintiff, for arrears of the annuity, from the 23d of October 1811 (up to which time the plaintiff, by her counsel, admitted the payment thereof), to the 13th of August 1816, the Master reported that, up to the 23d of October 1811, the annuity was paid, by remittances from Jamaica, in bills payable to William Carter or order, but that the plaintiff's receipt for the annuity was, from time to time, sent to the testator's executor in Jamaica: that, on the 15th of June 1812, Robert Anderson gave, to Wm. Carter, a power of attorney to receive, for him, all sums of money which should be remitted, to or for him, from the West Indies, or elsewhere, or due or to become due on any account whatsoever: that, under this power Wm. Carter, between the 15th of June 1812 and the 9th of December 1815 (after which he ceased to act under the same), received sums to the amount of several thousand pounds, for Robert Anderson, but that he had not accounted for what he so received. The Master further found, by the examination of the plaintiff, that she had heard and believed that Robert Anderson did, on coming of age, give, to Wm. Carter, a

power of attorney, and that it authorized him to act as the agent and attorney of Robert Anderson, and to receive moneys on his account, and that W. Carter did receive, on account of Robert Anderson, between June 1812 and December 1815, divers sums of money, and that W. Carter did, not, at any time during that period, pay to her the said annuity, or any sum in respect thereof, or retain, or in any manner apply the same to her use, or by her order, or permission, or for her maintenance, with her consent, or otherwise; and that she several times applied, to Wm. Carter, for payment of the arrears of her annuity, between June 1812 and December 1815, and that he always stated that Robert Anderson was very much in his debt, and not in a condition to pay either his or her claims, and that R. Anderson was in expectation of receiving a large sum of money shortly, when their claims would be satisfied. The Master added that he conceived that, under the circumstances aforesaid, it ought to be presumed that the annnity was, in some manner, applied for the separate use of the plaintiff, by W. Carter, her husband, to the 23d of October 1815, being the last day on which the same became due previous to the time when he ceased to act as the agent or attorney of Robert Anderson, or that the plaintiff trusted, to Wm. Carter, for the payment thereof, up to the time aforesaid; and no subsequent payment of the said annuity having become due, previous to the 13th of August 1816, the Master found that no sum was due, to the plaintiff, at the time last mentioned, for arrears of the annuity.

The plaintiff excepted to the report, insisting that the Master ought to have found that all the payments of the annuity which accrued, during the period in question, were due to her.

Mr Horn and Mr Ching appeared in support of the exceptions.

The Solicitor-General, Mr Pepys, and Mr J. Russell in support of the report, said that Mrs Carter had constituted her husband her agent: and that she had received her income and enjoyed it, and therefore was not entitled to demand it again.

The Vice-Chancellor. It appears, by the Master's report, that the plaintiff, the annuitant, knew that there was a power of attorney: because she says she believes it to be true that Robert Anderson did, on coming of age, give to her husband a power of attorney authorizing her husband to act as his agent or attorney, and that her husband did receive on account of Robert Anderson, between the months of June 1812 and December 1815, divers sums of money. Then she states, what I presume is a fact, that there never was, during that period, a payment made to her of her annuity of 500*l*. And she first states that she, several times, applied to the said Wm. Carter, for payment of the arrears of her said annuity, and that he always stated that Robert Anderson was very much in his debt, and unable to satisfy her claims. It appears also, as a fact in the case, that, prior to giving the power of attorney, there had been regular payments made, to Mrs Carter, by bills sent to her husband, he returning her receipts. I can not concur with that part of the argument in support of the report, by which it was attempted to convert the receipts which were given, from time to time, into a written authority by her, to her husband, that he should, at all

future times receive the annuity for her; for I think that those receipts can be considered only as acknowledgments that the money had come into her hands.

The question then is, whether, inasmuch as, under the power of attorney, William Carter was actually in the receipt of the income of the estate, out of which the annuity was to be paid to his wife, and she was living with him all the while, enjoying the same, and participating therein, and having the benefit of the expenditure, and not making any demand upon Robert Anderson, although she knew, as appears by her own statements, that the annuity was due, the doctrine of this court is not applicable.

It is true that the estate was not her husband's: but I do not see any substantial difference between the case where a wife is entitled to pin-money out of her husband's estate, and this case, where the husband was, by means of the power of attorney, actually in receipt of the rents of the estate, and applying them to his own use, his wife being, at the same time, living with him, and enjoying the benefit of the expenditure.

What was referred to the Master was, in effect, to inquire whether anything, and what was due, to the plaintiff, in respect of the annuity. The Master has come to the conclusion that nothing was due; and it appears to me that there is nothing, in this case, which would justify me in saying that the Master has come to a wrong conclusion.

I observe that the Master states, in his report, that the account of moneys received and paid, for Robert Anderson, by William Carter, still remains unsettled; and there is no evidence to contradict that. My opinion, therefore, is, that W. Carter will be entitled, as between himself and Robert Anderson, to take credit for the annuity; but that, as Mrs Carter, the wife, had the benefit and enjoyment of the property received by her husband, the Master's report ought not to be disturbed.

## Burrows *v.* Cottrell.

*3 Simons, 375.*

TESTATOR gave an annuity of 300*l.* free from all taxes and stamp duties, to I. and H. during their joint lives, and to the survivor during her life, and, after the death of the survivor, to G. for her life. By a codicil he revoked the annuity of 300*l.* given to I. and H. and gave them an annuity of 100*l.* each, with benefit of survivorship. The annuities of 100*l.* are subject to the legacy duty.

February 10, 22, 1830.

## Boazman *v.* Johnston.

3 *Simons*, 377.

Husband and wife being lessees of a rectory, assign it to trustees, in trust to sell and pay certain bonds of the husband and mortgages on his freehold estates: and by deed of even date, the husband in consideration of his wife having joined in the assignment, conveys his freehold estates in trust for himself and his wife for their lives, and, after their deaths to be sold for benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds and mortgages: Held that the bond-creditors had no right, as against the children, to throw the mortgages upon the produce of the freeholds.

February 11, 1830.

BY an indenture of the 23d of June 1812, the dean and chapter of Carlisle demised, to John Boazman and Mary his wife, their rectory of Kirkland in the diocese of Carlisle, for twenty-one years from the date of the indenture. By an indenture of the 25th of May 1814, made between Boazman and wife of the one part, and the defendants G. Fielding and R. W. Johnston of the other part, after reciting that Boazman was indebted to several persons, on mortgages affecting estates in the county of Durham, and on bonds, and that, being desirous to pay off the same, he and his wife had resolved to assign the leasehold premises to Fielding and Johnston, upon trust, to be sold, in order to raise money for that purpose: Boazman and wife assigned the rectory to Fielding and Johnston, for the remainder of the term of twenty-one years, and for all their renewable and other estate and interest therein, upon trust to sell the same, and to stand possessed of the moneys to arise from the sale upon the trusts declared by the next indenture; and, by an indenture, of the same date, and made between the same parties, Boazman and wife declared that the trustees should stand possessed of the moneys to arise from the sale, in trust to pay off the principal and interest then due, or thereafter to accrue due on the mortgages, securities, and bonds mentioned in the schedule to this deed, and then upon trust to pay the residue of the trust-moneys (if any) to Boazman. In the schedule were mentioned three indentures by which certain freehold and leasehold estates situate at Great Aycliffe in the county of Durham, were mortgaged and charged, by Boazman and wife, for securing 1,800*l.* and interest to Johnston, and 1,750*l.* and 765*l.* and interest to John Horner; and also two bonds executed by Boazman, one to Horner for securing 800*l.* and interest, and the other to Johnston for securing 1,400*l.* and interest.

By indentures of lease and release dated the 24th and 25th of May 1824, the release being made between Boazman, of the one part, and Fielding and Johnston, of the other part, and reciting that Boazman was seized, in fee, of the freehold hereditaments intended to be thereby released, and that he was, under or by virtue of several indentures of lease granted by the dean and chapter of Durham, and of divers assignments and other acts in law, possessed, of the leasehold hereditaments

intended to be thereby assigned, for the residue of several terms of twenty-one years, but that the same freehold and leasehold premises were subject to mortgage debts amounting to 9,676*l.*, and that by an indenture of appointment and an indenture of assignment, both bearing even date with the indenture of release, and made between Boazman and wife, of the one part, and Fielding and Johnston of the other part, divers freehold and leasehold hereditaments, in Westmorland and Cumberland had been appointed and assigned, by Boazman and wife, to Fielding and Johnston, in trust to be sold for the purpose of discharging, as well the 9,676*l.* as other debts and incumbrances of Boazman, and that Boazman did, previously to the executing of the indentures of appointment and assignment of even date, agree that, if his wife would join with him therein, he would release and assign, the freehold and leasehold hereditaments thereinafter described, to Fielding and Johnston, upon the trusts thereinafter expressed: it was witnessed that Boazman, in consideration of the premises, did thereby release and assign, the freehold and leasehold estates situate at Great Aycliffe, to Fielding and Johnston, their heirs, executors, administrators, and assigns, upon certain trusts for the benefit of himself during his life, and and so as to exempt those estates from being subject to his debts or engagements, it having been expressly stipulated, by Mary Boazman, upon her consenting to join in the appointment and assignment of even date, that those estates should be settled so as not to be liable to or affected by his debts, charges, incumbrances, or engagements, and, after Boazman's decease, in trust for his wife, during her life, and, after the decease of the survivor, in trust to sell, and to stand possessed of the moneys to be produced by such sale, upon certain trusts for the benefit of the younger children, then born or thereafter to be born, of Boazman and his wife.

Mr and Mrs Boazman having died, this suit was instituted, by their younger children, to have the trusts of the deeds of May 1824 carried into execution. By the decree, the rectory of Kirkland, and the freehold and leasehold estates at Great Aycliffe, were ordered to be sold; and it was referred to the Master to make the usual inquiries as to mortgages and incumbrances affecting the rectory and the estates at Great Aycliffe. It appeared, by the Master's report, that the proceeds of the sale of the rectory were not sufficient to pay, in full, what was due both on the bonds and on the mortgages mentioned in the schedule to the deed of declaration of trust; and, on the hearing of the cause for further directions, the question was whether, as between the plaintiffs and the bond-creditors, the mortgagees ought not to be thrown upon, and paid out of the produce of the Aycliffe estates comprised in their mortgages, so far, at least, as to leave sufficient, of the produce of the rectory, to pay the bond-debts in full.

The Solicitor-General and Mr Lovat, for the plaintiffs:

The bond-creditors had no lien upon the Kirkland rectory except what Mr and Mrs Boazman chose to give them. They must, therefore, come in *modo et forma*. They are entitled to come in, with the mortgagees, *pro rata* only. The recitals in the release clearly show what was the intention of the parties. Mrs Boazman was the purchaser of the Aycliffe estates, for herself and her younger children, in

[Boazman *v.* Johnston.]

consideration of giving up her interest in the other estates; consequently, the bond-creditors can not claim any thing except what was given to them by the assignment and declaration of trust.

Mr Horne and Mr Barber, for the executors of R. W. Johnston:

The proceeds of the rectory were devoted to the payment of certain mortgage and bond-creditors, whose names are found in the schedule to the declaration of trust. The former, were mortgagees of the Aycliffe estates. Their rights over the mortgaged estates were not affected by any of the transactions that took place. The mortgagees having two funds to resort to, and the bond-creditors having one fund only, which is insufficient to pay both classes of debts, the latter have a right to throw the former upon the other fund. Aldrich *v.* Cooper, 8 Ves. 382.

The Solicitor-General in reply:

If we look through the deeds, there is no difficulty in deciding the question. They all form but one transaction. The Aycliffe estates are, expressly, dedicated to the family, by the release: and it recites that, by deeds of even date, other estates had been devoted to the payment of the debts. Not one of the bond-creditors is a party to the deeds relating to the Kirkland rectory. They can take nothing but what is given to them.

The Vice-Chancellor. It seems to me that the bond-creditors, for whom provision was made out of the Kirkland rectory, are as much volunteers as the children of Mr and Mrs Boazman, who are entitled to the produce of the Aycliffe estates. The bond-creditors, therefore, are not entitled to more than is given them by the assignment and declaration of trust of May 1814. Those deeds give them a *pro rata* participation only, with the mortgagees, in the proceeds of the Kirkland rectory; and parties must take according to the agreement under which they are entitled. Consequently the bond-creditors are not entitled to more than to share, *pro rata*, the produce of the rectory, with the mortgagees.

## Vent *v.* Pacey.*

3 *Simons*, 382.

Upon a motion to dismiss, the delay in prosecuting the suit was satisfactorily accounted for. The court refused to make any order upon the motion, or to require the plaintiff to undertake to speed.

February 20, 1830.

MR. BARBER moved to dismiss the bill, for want of prosecution.

The motion was opposed by Mr. Spurrier. The facts and dates, as they appeared on affidavit, were as follows:

* Ex Relatione.

[Vent *v.* Pacey.]

The bill was filed on the 17th of July 1829. The answer was put in on the 16th of October. On the 10th of December, a notice of motion was given, by the plaintiffs, for the production of letters and papers. The motion was not made till the 22d, when an order was pronounced for the production, with the exception of a letter stated to have been written, by the defendant, in confidence, to his solicitor. The order was bespoken on the same day, but was not obtained until the 26th of January 1830. On the 28th of January a writ of execution of the order was obtained, and was served on the 3d of February. On the 8th of February, the papers and letters were left with the clerk in court. On the 17th of that month, a notice of motion, before the Lord Chancellor, for the production of the confidential letter, was given, by the plaintiffs, and a notice of motion, before the Vice-Chancellor, to dismiss, for want of prosecution, by the defendant.

Mr Barber insisted that the defendant was entitled to the usual undertaking from the plaintiffs, or at any rate, that the plaintiffs should be put upon terms.

The Vice-Chancellor was of opinion that sufficient cause was shown against the dismission of the bill; and refused to make any order.

## Swinfen *v.* Swinfen.

3 *Simons*, 384.

Last answer filed 30th November 1829. On 17th February 1830 defendant gave notice to dismiss. Two days afterwards plaintiff obtained order to amend. Motion to dismiss granted.

March 2, 1830.

THE answers of the defendants, Swinfen and Palmer, were filed on the 10th of November 1829; and the answer of the other defendant, Hinckley, was filed on the 30th of the same month. On the 17th of February 1830, the two first-named defendants gave notice of a motion to dismiss the bill, for want of prosecution. On the 19th of the same month the plaintiff obtained an order to amend, which was the only order that he had obtained for that purpose.

Mr Wakefield appeared for the defendants, in support of the the motion to dismiss.*

Mr Pepys and Mr Sanders for the plaintiff.

The Vice-Chancellor said that, although a plaintiff was at liberty to move to amend his bill after the two months had expired, and before the six weeks had expired, yet it did not prevent the defendant from moving to dismiss the bill.

Motion to dismiss granted.

* See the 4th, 13th and 16th of the New Orders.

## Wilson *v.* Dent.

3 *Simons*, 385.

A. seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted, for A. and, after his death, for the purposes of his will: but B. executed no declaration of trust. A. made a general devise of all his real estates; and after A.'s death B. was admitted. Held that he was a trustee for the devisees, and not for A.'s customary heir.

March 5, 1830.

JOSEPH WILSON, being seized in fee of freehold estates, and of a customary estate holden of the lord of the manor of Cotherstone with Hunderthwaite in Yorkshire, by his will, dated the 14th of June 1811, devised, to the defendants, John Dent and Caleb Wilson, in fee, all his messuages, lands, tenements, and hereditaments whatsoever, in trust to sell the same, and directed that the produce of the sales should be deemed part of his personal estate; and, after giving pecuniary legacies to some of the plaintiffs, he directed that the residue of his estate and effects should be distributed amongst the legatees, in proportion to the amount of their legacies.

In August 1811, the testator died, leaving the defendant, Charles Jopling, his heir at law and customary heir.

By an indenture of the 1st of April 1811, the testator had voluntarily surrendered, his customary estate, unto and to the use of the defendant, Dent, in fee, and covenanted, with Dent, to surrender the estate, according to the custom of the manor, to the use of Dent in fee. On the 26th of October 1812, (which was after the testator's death) Dent was admitted tenant of the estate.

The bill was filed for the administration of the testator's estate, and to have the trust of his will carried into execution.

Dent, in his answer, admitted that the customary estate was conveyed to him, in order that he might hold it for the testator during his lifetime, and, after his decease, upon the trusts of his will; and that the testator continued in the possession or receipt of the rents until his decease; but Dent never executed any declaration of the trust upon which the surrender was made.

The defendant, Charles Jopling, by his answer, said that he could not set forth whether the usual mode of effecting a settlement or will of customary estates within the manor, was, as stated in the bill, that is to say, by an absolute deed of alienation and surrender to a trustee, who was, thereupon, admitted, to the estate, at the next court: that he believed that the testator did make an absolute surrender, of the customary estate, to Dent, and that Dent was admitted to the estate on the 26th of October 1812, and that such alienation was entirely voluntary. He believed that the legal estate in the customary lands, was vested in Dent, and that the trust or beneficial interest therein, for default of any declaration thereof, resulted to the testator in fee simple,

and was then vested in him, C. Jopling, as the testator's customary heir; but he could not set forth whether the customary estate was or was not conveyed to and vested in Dent, in order that he might hold the same, for the testator during his lifetime, and, after his decease, upon the trust of the will.

The steward of the manor, who was examined for the plaintiffs, deposed that the custom of the manor was not to admit or recognize the alienation of customary freehold or copyhold estate by will, or to permit any trusts declared, by will or deed, of such estates to appear upon the court rolls; and that the only mode, as far as he was aware, of making such estates subject to the uses or trusts declared, of the same, by will, was, by having the testator's heir at law, or his alienee under a deed of alienation, admitted to such estates, and by getting such heir or alienee to execute a deed of trust, with which the court of the manor had nothing to do.

Mr Pepys, Mr Wilson, and Mr Stuart, for Charles Jopling, the customary heir:

The questions are, 1st, whether the testator had such an interest in the customary estate as that it could pass by his will; and 2d, if he had, whether the will operated upon that interest.

1st. The custom of the manor is that customary estates do not pass by will. The surrender to Dent was inoperative; for, as there was no declaration of the trusts upon which that surrender was made, the estate reverted to the surrenderor. It has been held that a trust estate in a copyhold, will, in some cases, pass by will; but it has never been so decided where the trust results. In this case the trust resulted, and, therefore, could not be devised.

2d. This will was intended to operate as a devise of the testator's interest, and not as an appointment of a use, and it contains no reference to the estate which was vested in the alienee. Kenebel *v.* Scrafton, 8 Ves. 30, Wagstaff *v.* Wagstaff, 2 P. W. 258, Doe *v.* Wroot, 5 East. 132.

Mr Barber for the plaintiffs:

The cases cited do not apply. In Kenebel *v.* Scrafton, the party was never admitted, and therefore, he never clothed himself with the legal estate. As to the case in East, the legal estate was all that a court of law had to do with. It is sufficient that Dent was admitted, though not at the court next after the surrender to him. Admittance has reference to the surrender, and he perfected his legal title by being admitted. The testator had the resulting trust when he made his will.

The Vice-Chancellor. The cases that have been cited are not applicable to the one now before the court: nor is the case of Floyd *v.* Willis, 5 East, 137, which is quoted in Doe *v.* Wroot.

In this case it appears, that, by a deed of April 1811, an alienation of the estate was made to John Dent, which was intended to be in trust for the testator. The testator made his will in June 1811, and used sufficient words to pass his interest in this estate. Prior to October 1812, the testator died; and, in that month, Dent was admitted. Then the question is, whether it is not to be considered that the will is a

declaration of the person in whose favour the alienee was to hold the estate. The will operates as a testification for whose benefit the trustee is to hold the estate; and my opinion is that the surrenderee is a trustee for the devisees.

## Pesheller *v.* Hammett.

3 *Simons*, 389.

THE amendment of a bill under leave given on the allowance of a demurrer, is not reckoned for the purposes of the 13th order.

March 8, 1830.

## Andrew *v.* Andrew.

3 *Simons*, 390.

If, upon a question of title, the Master is satisfied with the evidence produced before him, but upon the hearing of an exception to the report, the court thinks the evidence not sufficient, the court upon the application of the vendor will refer it back to the Master to review his report in order to give the vendor an opportunity of producing further evidence.

March 16, 1830.

THE title to lot 1, of the estates sold under the decree in this cause was objected to, by the purchaser, because it did not appear that a remainder in tail, limited to one D. Stacey, by the will of his grandfather T. Stacey, dated the 7th of December 1699, had been barred or become extinct.

The Master to whom the title was referred, reported that he was of opinion that, from the evidence produced, and the dealings with the premises by the subsequent owners, and the other facts and circumstances appearing upon the abstract, coupled with the great length of time that had elapsed and their being no evidence to the contrary, he was warranted in concluding that Daniel Stacey had died without issue*.

The purchaser excepted to this report.

Upon the hearing of the exception, on the 12th of March 1830, the Vice-Chancellor differed in opinion from the Master: but the counsel for the vendors having said that they could produce further evidence of the fact in question, his Honour referred it back to the Master to review his report.

The Vice-Chancellor afterwards ordered, upon the application of the purchaser, the exception to be placed in the paper, to be spoken to.

* See Doe *v.* Wolley, 8 Barn. & Cress. 22.

Mr Agar and Mr Seton, for the vendors, cited Coffin *v.* Cooper, 14 Ves. 205, Esdaile *v.* Stephenson, Madd. & Geld. 366, Paton *v.* Rogers, Madd. & Geld. 256.

The Solicitor-General and Mr Beames, for the purchaser, said that there was no instance where, in a case like the present, a reference back to the Master to review his report, had been made: that the Esdaile *v.* Stephenson had been appealed from, but that the appeal was not prosecuted*; and they relied on Lechmere *v.* Brasier, 2 J. & W. 287.

Mr Agar, in reply, said that Lechmere *v.* Brasier did not apply, as there the decree was erroneous: that here there was no defect of title, but merely a question of evidence of title.

The Vice-Chancellor. I should not have allowed this question to be spoken to, but that my attention was called to the fact that the purchaser was not a party to the cause.

The title is objected to on the groud that it does not appear that the issue of a remainder-man in tail, has failed. The Master thought that the evidence, produced before him, of that fact, was sufficient. If the evidence was weak, but the Master was satisfied with it, it would be singular that the vendors should be prejudiced, because the Master was in the wrong: and it would be hard upon them if they were not to be allowed to produce fresh evidence. There can be no hardship upon the purchaser; for if there is any delay on the part of the vendors, he can move to be discharged from his purchase.

## Egerton *v.* Jones.

3 *Simons*, 392.

Upon the allowance of exceptions to a report approving of a title, the court will, on the application of the vendor, refer it back to the Master to review his report in order to give the vendor an opportunity of producing evidence to remove the objection.

May 3, 1830.

THE question in this case was similar to that in the preceding one.

The suit was instituted, by the vendor of an estate, against the purchaser, to compel a specific performance of the contract. The purchaser having objected to the title, the usual reference was made to the Master, and he reported in favour of the title. The defendant then excepted to the report, and the exceptions were allowed.

On a subsequent day, Mr Horne and Mr Wigram, for the plaintiff, moved that it might be referred back to the Master to review his report, alleging that the plaintiff could produce evidence to show that certain limitations in a will (the existence of which was the ground of objection to the title) had failed or become extinct.

Mr. Knight and Mr Randell, for the defendant, the purchaser, contended that it would be inconsistent with the order allowing the ex-

* See Sudg. Vend. 208, 209 and 373.

ceptions, to refer it back to the Master to review his report: they cited Esdaile *v.* Stephenson, Madd. & Geld. 366, and Lechmere *v.* Brasier, 2 J. & W. 287.

The Vice-Chancellor. It is the course of the court, where the Master has, by expressing an opinion in favour of the title, prevented the vendor from showing that, if his opinion had been otherwise, still the title was good, to send it back to the Master to review his report, the party moving paying the costs of the motion.

Motion granted.

An application, by the purchaser, to discharge the order made on the above motion, was refused by Lord Lyndhurst C. on the 5th August 1830.

## Andrewes *v.* George.

3 *Simons*, 393.

Interest at 4 per cent., directed to be computed on advancements made by a father to his children, from the time when the father's property was divisible amongst them.

March 19, 1830.

THOMAS ANDREWES, by his will dated the 2d of April 1817, gave to James George and Charles Murray, all his personal estate, in trust to pay all his debts and his funeral and testamentary expenses, and to invest the residue in government securities, and to pay the dividends to his wife, Mary Andrewes, during her life, by half-yearly payments, the first payment to be made at the end of six calendar months after his decease, and, after her decease to assign and transfer, the capital, unto his five children, Mary Ann Palmer, George Pyne Andrewes, Isabella Makeig, Frederick Andrewes, and Thomas Andrewes, in equal shares: and after reciting that, upon sundry occasions, when some of his children had been in pecuniary difficulties, especially his sons George and Thomas, and his daughter Makeig, he had advanced divers sums of money, at their request, for their temporary relief, he directed that his trustees should, before they made such division or distribution of his estate, deduct and take, from such of his said sons' and daughters' shares, so much money as had been advanced and lent to him, her or them, by him, so as to render their shares quite equal and to the amount they would have been entitled to, had he not advanced the said sums of money, but that the whole had been remaining at his decease, and been attendant on the directions of his will.

The testator died on the 27th of September 1819. On the 7th of January 1820 his will was proved by his executors, and, in the same month of that year his widow died.

A bill having been filed, by George Pyne Andrewes, against his brothers and sisters and the executors, for the administration of the testator's estate, a decree was made on the 5th of February 1829, which

directed (amongst other things) that the Master should inquire and state what, at the testator's decease, was the amount of the sums of money which had been advanced and paid, by the testator in his lifetime, to or for the use of his children George Pyne Andrewes, Isabella Makeig, Thomas Andrewes, and Frederick Andrewes respectively; and that the Master should compute interest, on such advances, at the rate of four per cent. per annum, from the time of the testator's decease, but without prejudice to the question whether any and what interest should be charged thereon, and whether from the time of the testator's decease, or from any later period. The Master found that the testator had advanced and paid, to or for the use of his four last-named children, the following sums respectively, namely, 511*l.* 16*s.* 6*d.*, 278*l.* 1*s.* 3*d.*, 1,063*l.* 18s. 6*d.*, and 112*l.* 7*s.* 2*d.*: and the Master then stated the amount of the interest, on each of those sums, computed as directed by the decree.

The cause now came on to be heard for further directions, and the question was: from what period the interest on the advances ought to be computed?

Mr Parker and Mr Flather appeared for the different parties.

The Vice-Chancellor said that the testator meant that the deductions in respect of the advances, should be made at the time when his property would become divisible, namely, the death of his widow: and his Honour accordingly directed interest, at four per cent., to be computed on the advances, from the death of the testator's widow.*

## Garland *v.* Scott.

3 *Simons*, 396.

The court will not order a defendant to produce letters, which passed between him and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice.

March 22, 1830.

THE bill was filed, by the vendor, against the purchaser of an estate, to compel the specific performance of the agreement. The defendant, in his answer, admitted that various letters and notes relating to the estate and the agreement, and to the other matters in the bill mentioned, had been written, and sent and received, by the defendant and his solicitors and agents, to and from each other, and to and from other persons, and that he had the same, or some copies thereof, in his custody or power: and he set forth a list thereof, in the schedule to his

* Where children, some of whom only have been advanced, or who have not been all equally advanced, become entitled to their father's property, at his death, but the property is not distributed amongst them until after the expiration of a year from that event, the court would, perhaps, direct interest, at four per cent., to be computed, on the advances, from the end of that year.

answer; but he submitted that, inasmuch as all such letters and notes were written as communications made, between him and his solicitors, confidentially, and in the way of business, he was not bound to produce any of them, to the plaintiff, or for his inspection.

Mr Jacob, for the plaintiff, moved that the defendant might leave, with his clerk in court, for the usual purposes, the letters and notes, and copies of letters and notes, admitted by the defendant to be in his custody or power, and which were specified in the schedule. He cited Hughes *v.* Biddulph, 4 Russ. 190; and Williams *v.* Mundie, Ryan & Mood. 34.

Mr Teed, for the defendant, opposed the motion on the ground stated in the answer. He cited Preston *v.* Carr, 1 You. & Jer. 175.

The following order was made upon the motion:

"This court doth order that the defendant do, within three weeks, leave, in the hands of his clerk in court, the letters and notes, and copies of letters and notes admitted, by the said defendant, by his answer, to be in his custody, possession or power, and which are specified and set forth in the schedule to his answer, except such of the said letters and notes, and copies of letters and notes, as the defendant shall, by affidavit, declare to have passed, between him the said defendant, and his solicitors, Messrs Parr, merely in the relation of solicitor and client, and to have passed in the progress of this cause, or with reference to this cause previously to its being instituted, such letters, and copies of letters, notes and copies of notes to be particularized in such affidavits; and the defendant is to be at liberty to seal up any parts of those letters or copies of letters, notes or copies of notes, which he, on his oath, shall declare do not relate to the matters in question in this cause, and any part of the letters or copies of letters, notes and copies of notes from the said solicitors, which he, upon his oath, shall declare to contain merely legal advice; and the plaintiff's clerk in court, or agent, or solicitor are to be at liberty to inspect and peruse the same, and take copies thereof or extracts therefrom; but the same is to be at their own expense. Bolton *v.* the Corporation of Liverpool, post.

## Stewart *v.* Garnett.

3 *Simons*, 398.

A testator, resident in Jamaica, devised the rents, issues and profits of his estate, called Islington and Cove's Pen, in that island, to A. B. Held that the estate and the slaves, mules, cattle and machinery thereon passed under this devise.

Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining 21; and, in case of the death of either of them before that period, the legacy to be divided amongst the survivors. Held that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them a separate legacy to that amount.

[Stewart *v.* Garnett.]

Devise of "one moiety of the rents, issues and profits of my estate, named I., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues and profits of my said estate I give to R. and his heirs." Held that the grandchildren take the fee as tenants in common, in a moiety of the estate.

March 13, 1830.

THE will of the honourable James Stewart, late of Jamaica, was partly as follows:—"Item, I give and bequeath to Elizabeth Mary, John Stewart, and James Garnett, my grandchildren, the sum of 1,000*l.* sterling, payable to each of them on their attaining the age of 21 years; and, in case of the death of either of them before that period, the legacy hereby bequeathed to be divided among the survivors. Item, I give and bequeath unto Thomas, James, Robert, Dora, and Eliza Headlam, the children of my daughter-in-law, the sum of 500*l.* sterling, to be paid to each of them on their attaining the age of 21 years; and, in the event of either of them departing this life, the bequest to him, her, or them, so dying, to go to the survivors or survivor. Item: I give, devise, and bequeath one moiety of the rents, issues and profits of my estate, named Islington and Cove's Pen, in the parish of St. Mary, to be divided equally amongst all my grandchildren, the offspring of my dear son, James Law Stewart, and Wilhelmina his wife, under the direction of my executors. Item: the other moiety of the rents, issues and profits of my said estate and Pen, I give, devise and bequeath unto my beloved son, Robert Stewart, to him and his heirs for ever. I do hereby nominate, constitute and appoint my friends James Simpson, William Lambie, John Ede, my sons James Law Stewart and Robert Stewart, executors of this my will."

The bill was filed by Robert Stewart, James Simpson and Mary Ann his wife, who was one of the daughters, and next of kin of the testator, to have the trusts of the will carried into execution; and the usual decree was made. The Master, by his report, made in pursuance of the decree, found that, with respect to the account decreed to be taken of the testator's real estate, a state of facts and charge had been laid before him, by or on behalf of the plaintiff, Robert Stewart, and the infant defendants, Elmina Stewart, James Stewart, Robert Simpson Stewart, Mary Ann Stewart, and Charles Stewart, the infant children of the defendant James Law Stewart, and Wilhelmina his wife, whereby, after stating that the testator was, at the time of his death on the 25th of March 1824, seised of a real estate called Islington, in the parish of St. Mary in Jamaica, containing 700 acres of land, with buildings and machinery for carrying on the manufacture of sugar and rum, and also of a Pen called Cove's Pen, being an appendage of the Islington estate, also in the same parish, containing 300 acres, and that the testator was also at his decease, possessed of or entitled to 246 negroes on his estate called Islington, and 25 negroes on Cove's Pen; and also 105 horned stock and 80 mules on the Islington estate, and 61 horned stock on the estate called Cove's Pen, and also sheep and other cattle, and that the testator, by his will dated in October 1823, gave and bequeathed one moiety of the rents, issues and profits of his said estate, called Islington and Cove's Pen, to be divided equally amongst all his grandchildren, the offspring of his son, James Law Stewart and Wilhelmina his wife, under the direction of his executors; and he gave the other moiety of the rents, issues and profits of his said estate and Pen, unto his son

[Stewart *v.* Garnett.]

Robert Stewart and his heirs for ever; and that, consistently with the law of Jamaica, the negroes and live stock on the estate called Islington and Cove's Pen, at the time of his death, passed by the devise of the said estate and Pen, contained in his said will as aforesaid, the plaintiff Robert Stewart, and the infant defendants, the children of James Law Stewart and Wilhelmina his wife, therefore charged that the whole of the said negroes and live stock which were on the estate called Islington and Cove's Pen, as aforesaid, passed under the devise of the said estate and Pen, as being attached to, and as forming part of, and as essential to the said estate and Pen, and the rents, issues and profits thereof; and that the negroes and live stock ought not to be considered as, in any manner, forming part of the personal estate of the testator, not specifically bequeathed. The Master, upon consideration of this state of facts and charge, and the opinions of the late Attorney-General of Jamaica,*

* The Attorney-General's opinion was as follows :—"First, that law of Jamaica, which renders negroes in the possession of executors, assets for the payment of legacies, does not affect the case of a specific devise of those negroes; and, with respect to live stock, they would, as in England, be deemed personalty, and subject to the payment of legacies, unless they are specifically bequeathed. In this case, for the purpose of giving full effect to the devise of the testator's estate and of satisfying the terms in which he has expressed that devise, it appears to me absolutely necessary to consider that the negroes and live stock, which were on Islington and Cove's Pen, at the time of his decease, were included in the devise of those properties. He devises them by the description of his "estate named Islington and Cove's Pen." This description would, according to the ordinary language and understanding of persons in Jamaica, comprehend the negroes and live stock on the properties. The testator's intention is, however, still more strongly demonstrated by his devise of "the rents, issues and profits of the estate." By such a devise he must necessarily have contemplated, not merely the lands composing part of that estate, but the means attached to them, by which alone they could produce rents, issues and profits. These means are the negroes and live stock. If they could be withdrawn from the lands for the purpose of being sold for the payment of the legacies, the devisees could not derive, from the properties, those rents, issues and profits which are expressly devised to them. I am, therefore, of opinion that, consistently with the law of Jamaica, the negroes and live stock, which were on Islington and Cove's Pen, at the time of the testator's decease, passed by the devise, in the will, to the children of the defendant, James Law Stewart, and to the plaintiff, Robert Stewart. Second: I am of opinion, for the reasons given by me, in my answer to the preceding query, that the said negroes and live stock are not, according to the law of Jamaica, to be considered as personalty, liable to the payment of the legacies bequeathed by the testator's will."

The Judge-Advocate's opinion was as follows :

"If A. B. had died intestate, his lands and slaves would have descended to his heir at law. His administrator would have been entitled to his personalty; in which would have been included the cattle and mules on the sugar plantation and Pen, and all chattels not affixed to the freehold, to be divided according to the statute of distribution. The assets to pay debts would have been, 1st, the personalty; 2d, so many of the slaves as might be necessary. (Jamaica Acts, 8 W. 3, c. 2; 50 Geo. 3, c. 21; Stat. 5 Geo. 2, c. 7.) There being a will, the administration of the estate will depend on its construction. I am of opinion that the devisees of the sugar estate and Pen are entitled to all goods and moveables on and attached to those properties. The devise to A. B. and his heirs, of a moiety of the rents, issues and profits of the estate and Pen is, in my opinion, sufficient to comprehend the slaves, the cattle and stock, and all things aiding in the creation of those rents, issues and profits, and treated, by the testator, as part of the two establishments."

The Advocate-General's opinion was to the same effect.

and of the late Judge-Advocate, and Advocate-General of the same island, having been laid before him, found that the real estate of the testator, at the time of his death, consisted of the estates called Islington and Cove's Pen, and also of the said several negroes, horned stock, mules, sheep, and other cattle, then being thereon respectively, as before stated.

Exceptions were taken to this report, by the defendants, Thomas Duckworth Headlam, Dora Headlam, James Garnett Headlam, and Eliza Headlam, the children of the testator's daughter-in-law, Dorothy Headlam, and by the defendants Elizabeth Garnett, Mary Garnett, John Stewart Garnett, James Garnett, John Garnett, and Sarah Anne, his wife. The last-named defendant being, together with the defendant James Law Stewart, and the plaintiffs Robert Stewart and Mary Ann Simpson, the testator's next of kin. The exceptions were as follows:—1st. For that the Master, in taking the account of the testator's personal estate not specifically bequeathed, had not included therein the machinery for carrying on the manufacture of sugar and rum on the plantation called Islington and Cove's Pen, nor the negroes, horned cattle, mules, sheep and other cattle thereon. Whereas the exceptants were advised and submitted that the said machinery, negroes, horned stock, mules, sheep and other cattle were personal assets of the testator for the payment of his debts and legacies. 2d. For that the Master had found that the testator's real estate consisted of the estate called Islington and Cove's Pen, and also of the several negroes, horned stock, mules, sheep and other cattle then being thereon: whereas the Master ought to have found that the testator's real estate consisted of the estate called Islington and Cove's Pen only.

The Solicitor-General, Mr Rose, Mr Koe, Mr Turner, and Mr Farrar, in support of the exceptions:

The question in this case is altogether, unaffected by decision. In Lushington *v.* Sewell, 1 Sim. Rep. 465, Sir A. Hart, V. C., relied greatly upon the word "plantation:" that word does not occur here. The words in this case are not so strong as in Lushington *v.* Sewell. All that is devised here is the rents, issues and profits. Stock upon a farm, would not pass under a devise of the farm. The laws of Jamaica, except as they have been altered by local usage and acts of the legislature, are the same as the laws of this country were. A villain regardant, or in gross, would not have passed by a grant of the estate: he was an independent freehold. Slaves in Jamaica, though they are real estate, are not appurtenant to the soil, but may be detached from it. What is not appendant to the estate, can not pass under a devise of the estate.

Then as to the stock, &c. It would be monstrous to hold that every thing on the estate, though of a totally different nature, will pass under a devise of the estate. The words "heirs and assigns" are not applicable to the nature of the property. Every article on a farm in this country is necessary to the cultivation and enjoyment of it, and yet it has never been held that the live and dead stock, and farming implements will pass under a devise of the farm. This point was adverted to, by Lord Eldon, in Stuart *v.* the Marquis of Bute, 11 Ves. 657.

[Stewart *v.* Garnett.]

The VICE-CHANCELLOR. I always understood that, by the laws of Jamaica, slaves, though real estate, were assets to pay debts in the hands of the executors.

The testator has given one moiety of the rents, issue and profits of his estate called Islington and Cove's Pen, to the children of his son James Law Stewart, and the other moiety to his son Robert Stewart, and his heirs. Now I understand the Pen to be that part of a West India estate which is used for the purpose of supporting the cattle employed on the plantation. The testator, in the commencement of his will, has described himself as resident in Jamaica, and I can not but think that the words which he has used in this devise, are equivalent to giving his plantation and Pen. Those words would pass every thing that was necessary to the enjoyment of the estate; and I am therefore, of opinion that the Master has come to the right consclusion.

Exceptions over-ruled.

The exceptions having been over-ruled, the cause was heard for further directions.

Mr Pepys and Mr Koe, for the plaintiffs; and Mr Turner, for the defendant J. Law Stewart, the testator's heir.

The testator has given, one moiety of the rents, issues and profits of his estate, to the children of his son James Law Stewart and Wilhelmina his wife. This passes a life interest only. The use of the word "heirs" in the devise of the other moiety shows the word "estate" here is descriptive of locality: and the children are to take the rents under the distribution of the executors. It appears, by the devise of the other moiety, that the testator, when he intended to give a fee, knew what words to employ. Roe *v.* Holms, 2 Wilson, 80, Denn *v.* Gaskin, Cowp. 657, Right *v.* Sidebotham, Doug. 769, Paice *v.* the Archbishop of Canterbury, 14 Ves. 364, Chester *v.* Painter, 2 P. W. 335. The court can not come to a conclusion contrary to that which we contend for without over-ruling the last case.

Under the bequests of 1,000*l.* and 500*l.* to the testator's grandchildren, and the children of Mrs Headlam, each class is entitled to one legacy only of the amount specified. The testator uses the expression, "the legacy hereby bequeathed." The legacies are not payable until the legatees attain 21; and therefore they are not entitled to interest, except from that period.

Mr. Burge and Mr James, for other parties, contended to the same effect, with respect to the bequests in question.

Mr Rose, Mr Knight, and Mr Farrar, for the legatees, contended that each of them was entitled to a separate legacy of the amount specified. They relied on the words, "payable to each of them."

The VICE-CHANCELLOR. With respect to the legacies, it is plain that only one legacy of 1,000*l.* is given to each of the two classes of legatees. What is to be payable? Why the thing that is given; that is, the sum of 1,000*l.* in the one case, and the sum of 500*l.* in the other. The word "payable" is the same as "to be divided."

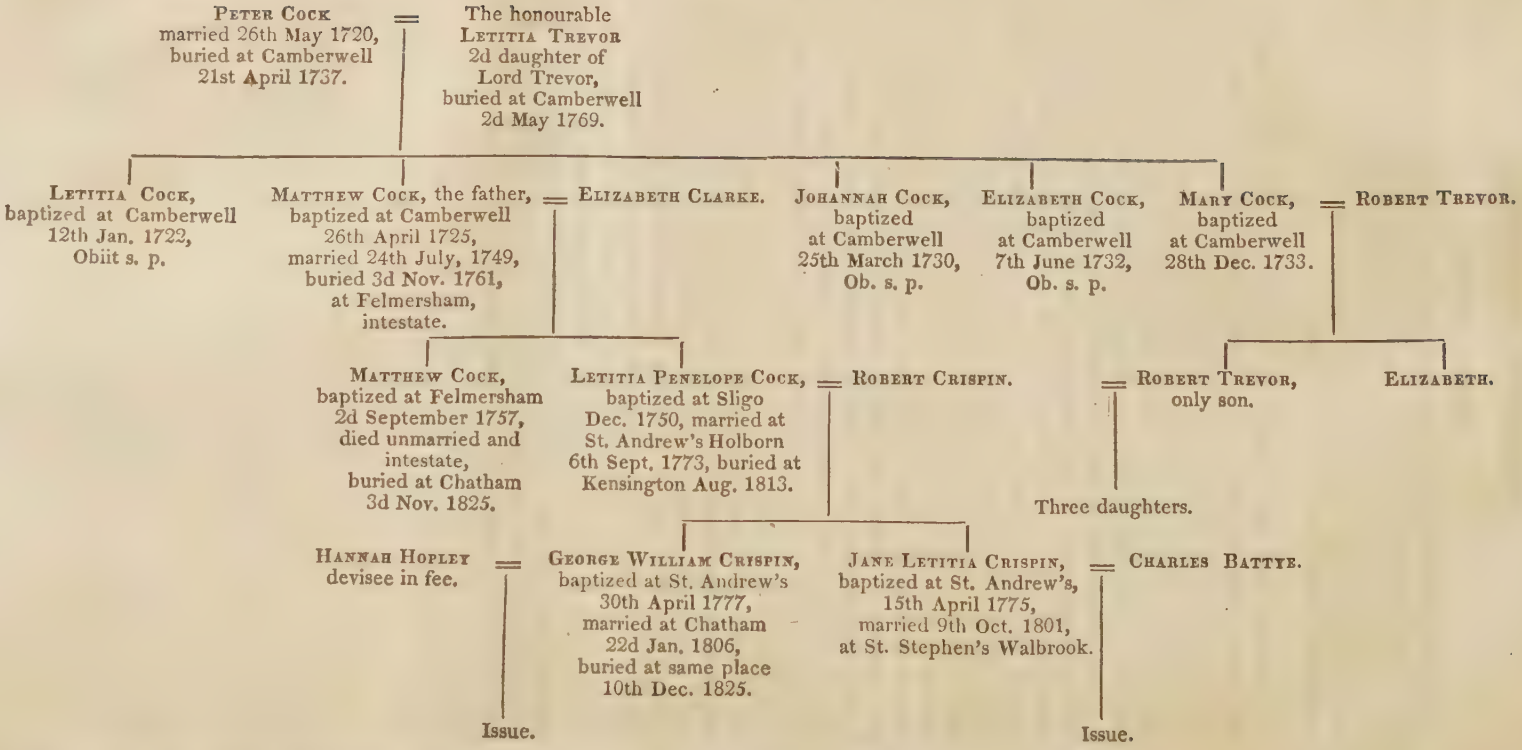
As to the interest which the grandchildren take in the real estate, I am of opinion that they take a fee in the moiety devised to them. The devise of the rents, issues and profits of the estate is the same as a devise of the estate itself. Subsequent cases have decided contrary to the case cited from Peere Williams.

"Declare that the machinery, negroes, horned stock, mules, sheep and other cattle on the testator's plantation, called Islington and Cove's Pen, passed under the several devises of the moieties of the rents, issues and profits of the said estate, and are not assets for payment of the legacies or annuities. And declare that the defendants, Elizabeth Garnett, Mary Garnett, John Stewart Garnett and James Garnett, under the will of the said testator, do take one legacy of 1,000*l.*, to be divided equally amongst them, payable to each of them, respectively, according to his or her proportion of such legacy, upon his or her attaining the age of 21 years; and that the share of any of them dying under the age of 21 years will go to the survivors of them. (The decree contained similar directions as to the legacy of 500*l.* given to the defendants. (Thomas Duckworth Headlam, James Garnett Headlam, Robert Headlam, Dora Headlam, and Eliza Headlam): declare that the aforesaid legatees (the Garnetts and the Headlams) are not entitled to any interest on the aforesaid legacies of 1,000*l.* and 500*l.*, except only, upon their respective shares thereof, after respectively attaining the age of 21 years, in case the payment of such shares shall be delayed beyond that period."

"Declare that, under the devise of the moiety of the rents, issues and profits, to the said testator's grandchildren, the offspring of his son James Law Stewart, and Wilhelmina his wife, the said defendants Elmina Stewart, James Stewart, Robert Simpson Stewart, Mary Ann Stewart, and Charles Stewart, do take estates, in fee simple, as tenants in common, in the said moiety of the said estate or plantation, called Islington and Cove's Pen, and its appurtenances, and the negroes thereon, and absolute interests, as tenants in common, in the horned stock, mules, sheep and other cattle, and the machinery, implements and effects belonging to the said estate, but not affixed to the freehold."

(Egerton *v.* Jones.)

# PEDIGREE.


Peter Cock married 26th May 1720, buried at Camberwell 21st April 1737.
The honourable Letitia Trevor 2d daughter of Lord Trevor, buried at Camberwell 2d May 1769.
Letitia Cock, baptized at Camberwell 12th Jan. 1722, Obiit s. p.
Matthew Cock, the father, baptized at Camberwell 26th April 1725, married 24th July, 1749, buried 3d Nov. 1761, at Felmersham, intestate.
Elizabeth Clarke.
Johannah Cock, baptized at Camberwell 25th March 1730, Ob. s. p.
Elizabeth Cock, baptized at Camberwell 7th June 1732, Ob. s. p.
Mary Cock, baptized at Camberwell 28th Dec. 1733.
Robert Trevor.
Matthew Cock, baptized at Felmersham 2d September 1757, died unmarried and intestate, buried at Chatham 3d Nov. 1825.
Letitia Penelope Cock, baptized at Sligo Dec. 1750, married at St. Andrew's Holborn 6th Sept. 1773, buried at Kensington Aug. 1813.
Robert Crispin.
Robert Trevor, only son.
Elizabeth.
Three daughters.
Hannah Hopley devisee in fee.
George William Crispin, baptized at St. Andrew's 30th April 1777, married at Chatham 22d Jan. 1806, buried at same place 10th Dec. 1825.
Jane Letitia Crispin, baptized at St. Andrew's, 15th April 1775, married 9th Oct. 1801, at St. Stephen's Walbrook.
Charles Battye.
Issue.
Issue.

## Egerton *v.* Jones.

3 *Simons*, 409.

An estate at C. was settled on A. for life, remainder to his first and other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, &c., in case of failure of issue of my body by my said wife, I give and devise the same," &c. He then limited the estate to his brothers in succession, and to their respective first and other sons in tail male. The court was of opinion that the devise was good.

March 16, 18, 1830.

IN pursuance of the articles of agreement entered into previous to the marriage of Peter Cock and Letitia Cock, on the 24th of May 1720, an estate at Camberwell was, by indentures of lease and release of the 7th and 8th of June 1728, conveyed to Thomas Trevor and John Trevor, in fee, to the use of Peter Cock for life, with remainder to the use of Trustees for the life of Peter Cock, to preserve, &c.; with remainder to the use of Letitia Cock, the wife of Peter Cock, for life; with remainder to the use of F. C. Masham and John Coupmaker, for 500 years, to raise portions for younger children; with remainder to the use of the first and other sons of Peter Cock and Letitia his wife, successively in tail male; with remainder to the use of Masham and Coupmaker, for 600 years, upon certain trusts, in the event of there being no male issue of Peter Cock and Letitia his wife who should live to attain the age of 21 years: with remainder to the use of Peter Cock, his heirs and assigns.

Peter Cock, by his will dated the 22d of January 1735, devised as follows: "And as to the reversion and inheritance of the freehold estate, by me already purchased at Camberwell aforesaid, and such other estate and estates as I shall hereafter purchase, in pursuance of my marriage articles, bearing date the 24th day of May, in the year of our Lord 1720, *in case of failure of issue of my body by my said wife*, I give and dispose thereof in manner following; that is to say, I give and devise the same to my brother, Theodore Cock, for his life, and from and after the determination of that estate, to the Rev. Edward Staunton, and John Hooke, Gent., and their heirs, during the life of my said brother, in trust to preserve the contingent uses hereinafter limited from being defeated; and, from and after the decease of my said brother, Theodore Cock, to the first son of his body, lawfully to be begotten, and the heirs male of the body of such first son, lawfully issuing, and, for want of such issue to the second, third, fourth and all and every son and sons of the body of my said brother, Theodore Cock, lawfully to be begotten, severally and successively, and in remainder, one after another, as they, and every of them, shall be in seniority, and to the respective heirs male of the body and bodies of every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body being always to be preferred, and to take before the younger of them,

and the heirs male of his or their body or bodies; and, for want of such issue, then to my brother, Walter Cock, for his life; and, from and after the determination of that estate, to the use of the said Edward Staunton and John Hooke, and their heirs, during the life of my said brother, Walter Cock, in trust to preserve the contingent uses hereinafter limited from being defeated, and, from and after his decease, to the first son of his body, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and, for want of such issue, then to the second, third, fourth and all and every son and sons of the body of my said brother, Walter Cock, lawfully to be begotten, severally, successively and in remainder, one after another, as they and every of them shall be in seniority, and to the respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, being always to be preferred, and to take before the younger of them, and the heirs male of his or their body or bodies; and, for want of such issue of the body of my said brother, Walter Cock, then to John Cock, grandson of my late uncle John Cock, for his life, and, from and after the determination of that estate, then to the said Edward Staunton and John Hooke, and their heirs, during the life of the said John Cock, in trust to preserve the contingent uses, hereinafter limited, from being defeated; and, from and after his decease, to the first son of his body lawfully to be begotten, and to the heirs male of the body of such first son, lawfully issuing; and, for want of such issue, to the second, third, fourth, and all and every other son and sons of the body of the said John Cock lawfully to be begotten, severally and successively, and in remainder, one after another, as they, and every of them shall be in seniority, and to the respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, being always to be preferred and to take before the younger of them, and the heirs male of his or their body or bodies."

Peter Cock died on the 12th of April 1737, leaving Letitia Cock, his widow, and one son, Matthew Cock, and four daughters him surviving. Letitia Cock died in 1769. Matthew Cock died in 1761, leaving a son, Matthew, and a daughter, Letitia Penelope, who in 1773, married Robert Crispin. Matthew Cock, the grandson of the testator, died unmarried and intestate in November 1825. Mrs Crispin died in 1813, leaving one son only, George William Crispin, who was the nephew and heir at law of the last named Matthew Cock, and also the heir at law of the testator, Peter Cock. George William Crispin died in December 1825, having devised all his estates to his wife, Hannah Crispin, one of the plaintiffs, in fee. Hannah Crispin afterwards conveyed the estate at Camberwell, to the other plaintiff, Egerton, in trust to sell; and Egerton agreed to sell the estate to Jones; but the latter having refused to complete the purchase, the bill in this cause was filed to compel a specific performance of the contract.

The Master having, upon the usual reference made to him, reported in favour of the title, the defendant excepted to the report, for the following, among other reasons: That it appeared, by the abstract, that the estate was, amongst other hereditaments, settled, in the year 1728, upon Peter Cock and Letitia his wife, successively, for life, with re-

mainder to their first and other sons, successively, in tail male, with remainder to Peter Cock in fee; and that Peter Cock devised the said remainder of the estate to several collateral branches of his family, successively, in tail male; that the estate, in tail male, in the first and other sons of Peter Cock, determined in the year 1825; and the plaintiffs made out their title, to the estate, under the heir at law of Peter Cock, and against the devisees of his will, in whom the defendant apprehended that the title to the estate was vested.

The Solicitor-General and Mr Randall, for the defendant, in support of the exceptions:

There is no rule of law against confining the word "issue" to issue of a particular class, 1 Russ. 407, and Willes Rep. 351. The intention of the testator is to be collected from the context. The object and purpose of the will may control and define the sense of the word. The question then is, what issue did the testator mean? By the word issue, here, the testator must have meant issue who took the estate under the limitations in the settlement. He refers to the settlement, and shows that he means to devise what was not disposed of by it. He can not be supposed to have intended to devise a reversion different from that which he had, and that the estate should go to his devisees in the event only of the death and failure of issue of persons who could not claim any interest in the estate, either under the will or under the settlement. What was to become of the estate in the mean time?

But the word "issue," here, does not create a limitation, it only marks an event; and no one can take but the devisee if that event has happened. He devises "the reversion," that is, the reversion, that was vested in him. Jones *v.* Morgan*. The reversion is devised to the collateral male branches only of the testator's family: all female issue are carefully excluded: thus the will and settlement correspond. The testator, in his will, followed up the purpose of the settlement in excluding the female branches; and this gives a clue to enable us to discover what issue the testator meant. The great purpose and object of the will was to keep the estate in the male line, and it is as strong to interpret the language of the will, as though the testator had, in terms, excluded the female branches of his family. Preston *v.* Funnell, Willes, 164. It is not unimportant to observe that the will was made within six years after the settlement: and it is impossible to believe that the testator could have forgotten that the females were excluded by the settlement or what his reversion was. If, therefore, he had meant issue general, he would have expressly devised the estate to them. To give the construction to the will which we contend for, supports the devise; whereas that contended for on the other side, destroys it. The cases in which the word "issue" or "heirs" has been confined to issue of a particular sex, are Buck *v.* Frencham, Anders. 8, Fitzgerald *v.* Leslie, 3 Bro. P. C. 154, Blackborn *v.* Edgley, 1 P. W. 600, Morse *v.* Lord Ormonde, 1 Russ. 382. This case is distinguishable from Bankes *v.* Holme, 1 Russ. 394, note, and Bristow *v.* Boothby, 2 Sim. & Stu. 465, by the circumstance that, in neither of those cases, does the testator exclude the female issue,

* See Appendix to Fearne's Cont. Rem. 592.

but each contains limitations to such issue. If, therefore, the question had arisen between the devisee and the heir-at-law, there would be but little doubt that the former would succeed: but here we are arguing for a purchaser from the heir, in the absence of the devisee; how then is it possible to say that the devise is void, and that the purchaser ought to take the title? It is sufficient, for a purchaser to show that there is a doubt whether the devise is good or not, Stapylton v. Scott, 16 Ves. 272.

Mr Horne and Mr Wigram, for the plaintiffs, in support of the report:

The words, "in case of failure of issue of my body by my said wife," abstractedly considered, mean an indefinite failure of issue; and, if those words are to be so understood in this will, the devise is void for remoteness: for neither the daughters of sons, nor the daughters of the settlor, take anything under the settlement. The court can not support the devise; for there is nothing, in the will, from which the court can determine whether the testator, if his attention had been called to the defect in the devise, would have corrected that defect by supplying limitations to the parties who are not provided for by the settlement, or by carrying back the devise to the point down to which the limitations in the settlement extend. Both ways of correcting the defect would have been open to the testator; and the court can not determine which of the two the testator would have chosen. Bristow v. Boothby, 2 Sim. & Stu. 465.

In Morse v. Lord Ormonde, 1 Russ. 382, the term was well limited; but the trusts of the money directed to be raised by means of the term, were too remote. It would have been absurd to suppose that the money was intended to be raised upon failure of one class of issue, and paid upon the failure of a different class. That incongruity was a guide to the court in supporting the devise: but the difficulty that the court felt in supporting the devise, shows the strength of the general rule. The case of Bankes v. Holme, 1 Russ. 394, note, is precisely in point. The testator, in that case, commenced with an erroneous description of the reversion of which he was seized, and then devised such reversion. Lord Eldon, in speaking of that case says: "These words describe an event, &c*." If, in this case, the words: "in case of failure of issue of my body by my said wife," are part of the description of the reversion, then this case is precisely within the reason of the case of Bankes v. Holme, as explained by Lord Eldon, and the devise is, therefore, too remote. If those words are not part of the description of the reversion, but are descriptive of the contingency upon which the devise was to take effect, then this case is governed by Bristow v. Boothby, and numerous other cases which determine the import of the words "dying without issue." The case of Bankes v. Holme is decisive in that view of the case also: for, as there was, in that case, a clear mistake, the court, upon admitted principles of construction, might take greater liberty with other parts of the will, then it can do in a case in which no such inaccuracy in point of expression, can be shown to exist: yet even in that case, the devise was held to be void, upon the strength of the general rule.

* See 1 Russ. 406, 407.

[Egerton *v.* Jones.]

The VICE CHANCELLOR. In my opinion this devise is good.

In cases like the present, it is always a question whether the testator has described, inaccurately, what he meant to dispose of, or has made the contingency a part of the devise. It appears to me that, in this case, the testator has used the words: "in case of failure of issue of my body by my said wife" as a description of the thing that he meant to dispose of; and, therefore, if I were compelled to decide the point, I should hold, that the devise in question is good; and consequently I can not force the purchaser to take this title. I argued that case of Sanford *v.* Irby, 3 Barn. & Ald. 654*, which was cited in Morse *v.* Lord Ormonde, but it has been always my opinion that it was a strong decision.

## Titcomb *v.* Butler.

3 *Simons*, 417.

A testator, having one nephew and one niece, and eight great-nephews and nieces living at his death, gave one tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children, at 21: and he empowered his trustees to apply all or any part of their respective shares, for their advancement. Held that all the great-nephews and nieces born before the eldest attained 21, though after the testator's death, were entitled to shares.

March 19, 1830.

ROBERT BOWSHER, by his will, dated the 27th of March 1820, gave all his real and personal estate to the defendants, Butler and Palmer, upon trust to sell his real estate, and to collect and get in his personal estate, and to pay one tenth part of the trust-moneys to his niece, Mary Kislingbury, and one other tenth part thereof to his nephew, John Leach, and to place out the residue of the trust-moneys upon government or real securities, and to apply a sufficient part of the interest and dividends for the maintenance and education of the children of his nieces and nephew, Elizabeth Bosley, Mary Kislingbury, and John Leach, lawfully begotten or to be begotten, until such children should respectively attain the age of 21 years, and, when and as they should respectively attain that age, in trust to pay and transfer all the residue of the trust-moneys, with the interest, dividends, and produce thereof which should not have been applied for their maintenance and education as aforesaid, or for putting any of them out to business, or otherwise advancing any of them in life, pursuant to the power thereinafter for that purpose contained, equally, unto and amongst all the said children of his said nieces and nephew, share and share alike, as tenants in common: but in case any of the said children should happen to die before he she or they should attain the age of 21 years, without leaving issue, then he gave the share or shares, of him her or them so dying, unto the survivors, as tenants in common: but in case any

* See Andree *v* Ward, 1 Russ. 260.

of the said children should die under 21, leaving issue, then he gave the share or shares of him or them so dying, to his her or their issue, as tenants in common, to be paid to such issue when they should respectively attain 21, the interest, dividends and produce thereof to be applied by his trustees, in the mean time, for their maintenance and education. But in case all the children of his nieces and nephew should die under 21, without leaving issue, then he gave the residue of his trust-moneys unto his next of kin: and he empowered his trustees to *apply all or any part of the respective parts or shares* of any of the children of his nieces and nephew, of and in the trust-moneys, for putting them out to business, or advancing them in the world, as his trustees should think fit.

The testator died on the 16th of April 1820. At the time of his decease Elizabeth Bosley was dead*: but Mary Kislingbury and John Leach, and eight children, the issue of them and Eliz. Bosley, were then living.

The bill prayed that the rights and interests of the children of the testator's nieces and nephew, named in the will, might be ascertained and declared; and that the shares of those who had attained 21, might be paid to them, and that the shares of those who were infants, might be secured for their benefit.

It appeared by the Master's report, made in obedience to the decree, that the plaintiff R. Titcomb was the oldest of all the children, and that he attained 21 in the year 1825: and that Mary Kislingbury and John Leach had children born after the testator's death, but before the plaintiff attained 21, and that John Leach had two children born after the plaintiff attained 21.

On the cause coming on for further directions, Mr Horne and Mr Rolfe, for the plaintiff, contended that none of the children, except those who were born at the testator's decease, were entitled to a share of the trust property, because the testator had authorized his trustees to apply, immediately after his decease, the whole of the share of any of the children, for their advancement, which could not be done unless all the parties entitled were then living: that the testator having, at his death, one nephew and one niece, and eight great-nephews and nieces, and having directed his property to be divided into ten shares, and having given one of those shares to his nephew, another to his niece, and the remainder to his great-nephews and nieces, it could not be doubted that he had in view his eight great-nephews and nieces who were then born: that, if the trustees had advanced the share of one of those individuals, an after-born child could not be let in, without causing an unequal distribution of the testator's property.

The Vice-Chancellor (without hearing Mr. Knight, Mr Boteler, Mr Wakefield, and Mr Wood, who appeared for the defendants) said that, the general rule, in cases like the present, was that all the claimants who are born before the period of division, were entitled to participate in the property bequeathed; that the testator had directed, in this case, in what manner the share of a child, who might die before the period of division, was to be disposed of: that there was nothing in the will

* It did not appear whether Elizabeth Bosley was, or was not dead at the date of the will.

to show that any of the children, where born before that period, should not take: that, as the trustees were authorized to advance any of the children, from time to time, the clause must be read, as if the word "presumptive" (which was used, on similar occasions, in marriage settlements), had been introduced into it.

"Declare that two tenth parts of the clear residue of the testator's real and personal estate vested, on the testator's decease, in his nephew and niece, John Leach and Mary Kislingbury, and that the remaining eight tenth parts thereof became divisible, on the 29th day of September 1825, when the plaintiff, Robert Titcomb, attained the age of 21 years, and that the plaintiffs, Robert Titcomb and Henry Titcomb, and the defendants, William Titcomb and Ann Bosley, Lydia Kislingbury and Elizabeth Kislingbury and Thomas Kislingbury, Elizabeth Leach, Caroline Leach and Emma Leach, being the children of the testator's nieces and nephew, Elizabeth Bosley, Mary Kislingbury and John Leach, born before the said 29th day of September 1825, are entitled to such eight tenth parts of the said residue, in equal shares, and that the defendant, Louisa Leach, who was born after the plaintiff, Robert Titcomb attained his age of 21 years, and Matilda Leach, who was born since the commencement of this suit, are not entitled to any shares in such eight tenth parts of the residue."

## *In re* Birmingham Benefit Society.

3 *Simons*, 421.

The word "insolvent," in 33 Geo. 3, c. 54, s. 10, means a person who has taken the benefit of an insolvent debtors' act; and not one who has merely made an assignment of his effects for the benefit of his creditors.

March 25, 1830.

THIS was a petition, presented by two persons, who were the stewards of a benefit society, established at Birmingham in 1818, on behalf of themselves and all the other members of that society. It stated that, in April 1828, one Kelly, a publican, had been appointed treasurer of the society, and that he continued to act in that capacity until the 22d of October 1829, and that, during that period, various sums of money were paid to him, as such treasurer, by the members; that, in November 1829, Kelly assigned all his estate and effects to W. Roden and Samuel George, upon certain trusts for the benefit of his creditors; that, at the date of the assignment, Kelly was indebted, to the society, in the sum of 130*l.*, in respect of moneys paid to him as treasurer; that Roden and George had possessed themselves of Kelly's personal estate and effects, under the assignment: that, on the 4th of November 1829, the petitioners had given notice, to the trustees, of the debt due to the society, and required them to pay the same before they proceeded to divide the property amongst Kelly's creditors. The petition prayed that the trustees might be ordered to pay, to the petitioners, as the

[*In re* Birmingham Benefit Society.]

stewards of the society, the sum of 130*l.* out of Kelly's estate and effects, in preference to the other creditors.*

It was stated, in the affidavit made by Roden in opposition to this petition, that, in October 1829, Kelly was indebted to Roden and George in 200*l.*, and being in embarrassed circumstances, proposed to make over, to them, the whole of his property, in trust for themselves and the rest of his creditors, and that thereupon, by an indenture, dated the 22d of October 1829, and made between Kelly of the first part, Roden and George of the second part, and the several other persons, creditors of Kelly, whose hands were thereunto subscribed and seals affixed, of the third part, Kelly, in consideration of 5*s.*, paid to him by Roden and George, assigned to them all his household goods and furniture, chattels and effects, in trust to sell, and, after paying the expenses of the sale, and other expenses therein mentioned, to divide the remainder amongst themselves, and all the other creditors of Kelly, who should execute the indenture within three months after its date.

Mr. Sharpe, for the petitioners, said that the question was, whether the treasurer had become insolvent within the meaning of 33 Geo. 3, c. 54, s. 10. He contended that it was the intention of the legislature that, whenever the property of the treasurer of a benefit society was to be divided amongst his creditors, priority should be given to the demands of the society.

Mr Knight and Mr Hayter, for the respondents, said that, as the word "insolvent," was coupled with the word "bankrupt," the act meant a person who had taken the benefit of an act for the relief of insolvent debtors.

The Vice-Chancellor said, that he considered that what the legislature meant by the term "insolvent," in the act referred to, was not a person who had made a mere assignment for the benefit of his creditors, but a person who had taken the benefit of an insolvent debtors' act; and he dismissed the petition, with costs.

* By 33 Geo. 3, c. 54, for the encouragement and relief of friendly societies, it is enacted, "that if any person appointed to any office by any such society, and being entrusted with, or having in his hands or possession any moneys or effects belonging to such society, or any securities relating to the same, shall die or become a bankrupt, or insolvent, his executors or administrators, assignee or assignees, shall, within 40 days after demand made by the order of any such society, or the major part of them assembled at any meeting thereof, deliver over, all things belonging to such society, to such person or persons as such society shall appoint, and shall pay, out of the assets or effects of such person, all sums of money remaining due, which such person received by virtue of his said office, before any of his other debts are paid or satisfied; and all such assets and effects shall be bound to the payment and discharge thereof accordingly." Sect. 10.

## Kendall *v.* Russell.

3 *Simons*, 424.

Testator gave the yearly sum of 2,000*l.* sterling, to his wife for her life, and, after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.* He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, and, after her decease, for her children. The trustees invested 100,000*l.* five per cents., to answer the two yearly sums. The stock was afterwards converted into four per cents., whereby the dividends became insufficient to pay the yearly sums. Held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate.

April 3, 1830.

JESSE RUSSELL made his will, dated the 10th of June, 1818, which was in the following words: "I give the yearly sum of 2,000*l. sterling money* to my wife Elizabeth Russell, and to my daughter, Jemima Elizabeth Russell, during their joint lives, and to my said wife, for her life, in case she survives my said daughter, and, after the decease of my said wife, then I give the said *yearly sum* to my trustees and executors, hereafter named, upon the same trusts as are hereinafter declared concerning the *yearly sum* of 3,000*l.* hereinafter bequeathed to my said daughter. Also I give and bequeath, to my said wife and daughter, all my wines, liquors, and provisions, of every kind, which shall be in my dwelling-house at the time of my decease; also I give and devise, unto and to the use of my son Jesse Watts Russell, of Hamhall, in the county of Stafford, Esq., and Wm. Matthew Raikes, of Walthamstow, Esq., and the survivor of them, and the heirs, executors and administrators of such survivor, all my freehold and copyhold estates, situate in Walthamstow aforesaid or elsewhere, in the county of Essex, and also *the yearly sum of* 3,000*l. sterling, to issue and arise out of and from the dividends of a sufficient quantity of stock in the navy five per cent. annuities of the bank of England*, to be appropriated and invested, in the names of my said trustees for that purpose, in trust for my said daughter, Jemima Elizabeth, during her life, for her sole and separate use, independent of any husband she may marry; and I hereby direct that the same shall not be subject to the control, debts or engagements of any husband of my said daughter: and I declare that her receipt alone, notwithstanding her coverture, and whether she shall be married or sole, shall be a sufficient discharge, or sufficient discharges for the yearly income of the said estates and dividends of the said *trust stock:* and, from and after my said daughter's decease, then upon trust for all and every her child and children, if more than one, to be equally divided between them, as tenants in common, and not as joint-tenants, as his, her or their respective heirs, executors and administrators: and in case any such child or children, being a son or sons, shall die under the age of 21 years, or being a daughter or daughters shall die under that age without having been married, then, as to the share or shares,

as well original as by survivorship, of him, her or them so dying, in trust for the other or the others of the children of my said daughter, equally to be divided between them, if more than one, as tenants in common, and not as joint-tenants, and his, her and their heirs, executors and administrators; and upon further trust after my said daughter's decease, and during the minority of her child or children, to apply, a competent part of the yearly income of each child's share, in or towards his or her maintenance and education, and also to apply, any part of the said principal out of which such shares may arise, for the advancement or preferment in life of such child or children: and, in case my said daughter shall die without leaving any child, or, if leaving one or more child or children, he, she or they, being a son or sons, shall die under the age of 21 years, or being a daughter or daughters, shall die under that age without having been married, then, as to all such freehold and copyhold estates and premises, and the said principal stock, and all arrears of interest, dividends and profits of the same respectively, upon trust for my said son, the said Jesse Watts Russell, his heirs, executors and administrators, absolutely, for ever. Also I give, to my said son and the said William Matthew Raikes, all my household goods and furniture, plate, linen, china, carriages, horses, garden and farming implements, in trust for my said wife and daughter, during their joint lives, and for my said wife during her life, in case she survives my daughter, and, after my wife's decease, in trust for my said daughter, during her life, for her sole and separate use, independent of any husband she may take as aforesaid; and, after her decease, in trust for her child and children, if any, in the same manner as the yearly sum of 3,000*l.*, and the stock whereout the same is to issue, as aforesaid, are above given to them, and with the like limitations over to my said son, and in the like events as are above expressed with regard to the said yearly sum; and I direct that my said trustees and executors shall appropriate and invest, in their names, such quantity of and so much stock, in the said navy five per cent. annuities transferable at the Bank of England, as shall be fully sufficient to produce and answer the payment of the said several yearly sums of 2,000*l.* and 3,000*l.*, so as aforesaid above given upon trust as aforesaid. And I give, to the said William Matthew Raikes, the sum of 200*l.* And all the rest, residue and remainder of my real and personal estate, property, goods, chattels and effects, whatsoever and wheresoever, not hereinbefore otherwise disposed of, subject to the payment of my just debts, funeral and testamentary expenses, and the legacies above bequeathed, I give, devise and bequeath the same, and every part thereof, unto my said son, Jesse Watts Russell, his heirs, executors and administrators, for his and their own use, absolutely, for ever; and I constitute and appoint, him, my said son Jesse Watts Russell, and the said William Matthew Raikes, executors of this my will." The testator died on the 28th of June 1820. The testator's daughter intermarried with the plaintiff Peter Kendall: and there was issue of that marriage, at the time when the bill was filed, one child only, namely, the defendant Russell Kendall. The testator's widow was also living, and was made a defendant to the bill.

The trustees caused to be placed, in their names, 100,000*l.* navy five per cents., to answer the payments of the yearly sums of 2,000*l.* and

3,000*l.*, and there still remained a very large residue of the testator's personal estates.

Under 3 Geo. 4, c. 9, this sum of stock was converted into 105,000*l.* new four per cents., the dividends whereof were insufficient to pay, in full, the 2,000*l.* and 3,000*l.*

The bill prayed that it might be declared that the plaintiff Jemima Elizabeth Kendall, and the defendant Elizabeth Russell were entitled, during their joint lives, and that the survivor of them was entitled, during her life, to receive the annuity of 2,000*l.*, in full, from the death of the testator, and that the plaintiff Jemima Elizabeth Kendall, was entitled to receive in full, during her life, the said annuity of 3,000*l.* and that the defendant, Jesse Watts Russell, might be decreed to make an investment, in order to answer the said annuities and bequests, of such a sum of stock, as, along with the said 105,000*l.* four per cent. bank annuities, would yield, during the lives of the plaintiff Mrs Kendall, and the defendant Mrs Russell, and the life of the survivor of them, dividends to the amount of 2,000*l.* and 3,000*l.* a year, and that, out of the said dividends, the yearly sums of 2,000*l.* and 3,000*l.* might be paid to them, according to their respective rights.

The Solicitor-General, Mr Rose, Mr Sidebottom, Mr Spence, Mr Batley, and Mr James Russell, for the plaintiffs, and for the defendants in the same interest:

The bequests in question are gifts of annuities, and not of the income of a sum of stock. The testator looked only to a mode of securing the annuities; and, at the time, no better mode suggested itself to him, than the purchase of a sum of navy 5*l.* per cents. He intended that sum to be a fund of security, and not of payment. Can it be contended that the testator intended to make it imperative, on his widow and daughter, to be content with the income of the stock, although it might be reduced to one-half of its original amount? As to the first annuity, no doubt can be entertained that he plaintiffs are entitled to what they ask. May *v.* Bennett, 1 Russ. 370. In that case the testator left it to the executors to provide the stock. Here he has himself pointed out the stock. But if he had given the executors a discretion as to the stock to be provided, the principle would not be altered. Davies *v.* Wattier, 1 Sim. & Stu. 463. Where a discretion is given, and it is exercised, it is just the same as if the testator had exercised it; therefore May *v.* Bennett is precisely in point. The residue is very large; and, therefore, the testator could not be alarmed at the deficiency being supplied out of the residue. That will aid the court in coming to a conclusion as to what was the probable intention of the testator. The 3,000*l.* is equally a general legacy as the 2,000*l.* The testator has used words which show that he intended it to be a gift of money; for he has used the word "sterling." The stock is mentioned with a view, merely, of securing the gift; and the annuity is mentioned as a sum of money. There must be yearly sums of the specified amounts, not only at the death of the testator, but at two other periods, namely, the death of the widow and the death of the daughter. The executors were bound to invest a sum sufficient, at all times during the existence of the annuities, to produce the yearly sums of 2,000*l.* and 3,000*l.* The five per cents. were, at all times, liable to be reduced. If the testator had intended that the children

[Kendall *v.* Russell.]

should take the stock, he would have given it to them: but he gives to them the yearly sums. In disposing of the residue, the testator gives it "subject to the payment of the legacies above bequeathed." Now he had given no legacies except the annuities and the legacy to Raikes. If he intended the navy five per cents. to be set apart, why did he give the residue subject to the legacies? He does not say that the residue, after setting apart the stock, shall go to his son; but that it shall go to him, subject to the legacies. The annuities are charged on the residue, after the investment of a sufficient sum of stock.

The Vice-Chancellor, without hearing Mr Knight, Mr Roupell, and Mr Swanston, who appeared for the defendant Jesse Watts Russell, the residuary legatee, delivered judgment as follows:—The testator, after having given the yearly sum of 2,000*l.* to his wife and daughter, during their joint lives, and to the survivor of them, during her life, gives, to the trustees, the yearly sum of 3,000*l.* to issue and arise out of the dividends of a sufficient quantity of stock in the navy five per cent. annuities, to be appropriated and invested, in their names, for that purpose: so that, in the very gift of the 3,000*l.*, in the shape of an annual sum, notice is taken that it is to arise from the dividends of a sufficient quantity of stock in the five per cents., to be appropriated and invested in the names of the trustees. The testator then declares the trust for the separate use of his daughter, and that her receipts shall be sufficient discharges for the income of the said estates and the dividends of the said trust stock: and, therefore, the testator refers to the 3,000*l.*, as arising from the dividends of the trust stock. He then proceeds: "And in case my said daughter shall die, without leaving any child, or, if leaving one or more child or children, he, she, or they, being a son or sons, shall die under the age of 21 years, or, being a daughter or daughters, shall die under that age, without having been married, then as to all such freehold and copyhold estates and premises, and the said principal stock, &c." It appears to me that the only construction that can be put upon this part of the will, is that it is a gift of so much navy five per cents. as will produce an income of 3,000*l.* a year.

The testator then goes on to give his household goods and furniture, &c. in trust for his wife and daughter, and the children of his daughter: "in the same manner as the yearly sum of 3,000*l.*, and the stock whereout the same is to issue as aforesaid, are above given to them." Now the testator had previously given an annuity of, 2,000*l.*: and he has directed his trustees and executors to appropriate and invest, in their names, such a quantity of stock, in the navy five per cents, as should be fully sufficient to produce and answer the payment of the yearly sums of 2,000*l.* and 3,000*l.* by him before given. It appears to me that that is a direct trust, created by the testator, that there should be a fund immediately separated from his estate, sufficient to produce the two yearly sums of 2,000*l.* and 3,000*l.* or, in other words, 100,000*l.* I can not suppose that the testator meant to give the 2,000*l.* in a manner less liable to reduction than the 3,000*l.* It is quite idle to imagine that he intended the two sums to be placed on a different footing.

It is true that the words by which the 2,000*l.* is given, do not so specifically direct that it shall issue out of the dividends of a sum of stock, as the words do, by which the 3,000*l.* is given. But the testa-

tor afterwards says: "I give the said yearly sum, to my trustees and executors, upon the same trusts as are hereinafter declared, concerning the yearly sum of 3,000*l.*, hereafter bequeathed to my said daughter." So that he has, by reference to the 3,000*l.*, made that which is to produce the 2,000*l.* subject to the same trusts: and as the 3,000*l.* is to take effect by a severance, from his estate, at his death, how could his will be executed but by severing 100,000*l.* so as to pay the 5,000*l.* a year. No man can look at this will without seeing that the expressions in it are those of a lawyer used to clothe the intention of a testator.

The question then is whether this case is affected by any of the cases that have been cited. The first case is Davis *v.* Wattier. It is clear that the annuity there given, was a charge upon the whole personal estate. For the testator gave the annuity to be paid by his executors out of his personal estate not specifically bequeathed; and gave, to them, all his personal estate not specifically bequeathed, in trust to sell, and to invest the produce in the public funds, and, out of the dividends to pay the annuity. No particular stock was directed to be selected. The petition, in that case, was presented to carry into effect the clear intention of the testator: and the Vice-Chancellor says that the appropriation of the 4,000*l.*, five per cents., was not the act of the petitioner, but was the act of the court; and that as the annuity was a charge upon the whole of the residue, the petitioner was entitled to have the deficiency which had been occasioned by the conversion of the stock, supplied out of the other funds in the cause.

In May *v.* Bennett, the testator gave, to his executors, all his property, real and personal, in trust, after all his debts were discharged, to lay out, in what government security they pleased, as much money, arising from his estate, as would produce the annual interest of 54*l.* 12*s*, per year, for the sole use of his wife. The executors, in order to provide for this bequest, invested, a portion of the testator's estate, in navy five per cents. Now one observation that may be made upon that case, is that that was not such an execution of the trust as this court would have directed; for this court would not have permitted the appropriation to be made, in navy five per cents. Therefore the trust, as it was executed, was beneficial, not to the annuitant, but to the residuary legatee. In that case too, there was no direction that the annuity should be paid out of any particular stock.

Neither of these cases is at all similar to the present case. Here there was, in fact, such an appropriation as the court would have directed if a bill had been filed immediately after the testator's death. If the five per cents. had been reduced at the death of the testator, the court would have directed a sufficient sum of three per cents. to be invested to answer the payments of the two yearly sums. But the reduction did not take place until two years after the testator's death; and, as he has pointed out the particular mode of appropriation to answer these annuities, he meant that when the appropriation should be made, his son should have the residue of his estate.

Nothing turns upon the words: "subject to the payment of the legacies above bequeathed."

## *In re* Eau Brink Drainange.

3 *Simons*, 435.

BY a drainage act, the commissioners were empowered, when required for the purposes of the act, to purchase, and to make satisfaction for damage done to lands, and if the land-owners refused to treat, then to apply to two magistrates to issue their warrant to the sheriff to summon a jury to ascertain the amount of the purchase-money or satisfaction. By a subsequent section, if the land-owners and the commissioners could not agree as to the compensation for damages done by the commissioners, the same were to be ascertained by a jury *to be impannelled as aforesaid:* Held that, in that case, the owners of the lands damaged, and not the commissioners, were to apply to the magistrates.

April 5, 1830.

## Cann *v.* Cann.

3 *Simons*, 447.

An estate sold under a decree, was described as of a certain annual value: and, by the conditions, compensation was to be made for any error in the particular. The purchaser paid his money into court, was let into possession, and took a conveyance. After he got into possession, he discovered that the rent was overstated in the particular: Held that he was entitled to a compensation out of his purchase-money.

April 6, 1830.

IN April 1824 certain premises were put up for sale, by auction, under an order in this cause. In the printed particulars, the premises were stated to consist of a farm house and other buildings, and 160 acres of land, more or less, situate in the parish of Drew Steignton, in Devonshire, and to be then in the occupation of certain persons, as the tenants thereof from year to year, at a rent of 55*l.* per annum. By one of the conditions of sale it was provided that, if there should appear any error or mistake, in the description, or admeasurement of the estate, in the particular, or any other error or mistake whatever should appear respecting the estate or any part thereof, such error or mistake should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require, such compensation or equivalent to be determined by the Master. Upon the faith of the representations in the particular, J. W. Phipson became the purchaser of the estate, with the timber thereon, for 2,112*l.* 3*s.*; and paid a deposite upon that sum. He was afterwards confirmed the purchaser; and, in March 1825 he paid into the bank, in trust in the cause the remainder of his purchase-money, which was not to be paid out without notice to him. The purchase-money was laid out in the usual manner; and Mr Phipson was

let into possession of the premises from the preceding quarter-day, and in the same year, 1825, the property was conveyed to him. After he had been let into possession, he discovered, upon applying for the rent, that it did not exceed 40*l.* per annum: upon which a long correspondence took place between him and his agents and the solicitors and agents for the parties in the cause, relative to the mistake, as to the amount of the rent, in the particulars of sale. This correspondence lasted till November 1829. In March 1830, and before the cause was heard for further directions, Mr. Phipson presented a petition in the cause, praying that a compensation might be made to him in respect of the error in the particular, and that the amount (to be settled by the Master if necessary) might be paid to him out of the sum of 3,682*l.* 19*s.* 5*d.* cash, and 7,226*l.* 17*s.* 5*d.* consols then standing in the Accountant-General's name, in trust in the cause. The petitioner accounted for the delay in applying to the court, on the ground of the correspondence that had taken place.

In opposition to this petition, an affidavit was made, by the solicitor for the plaintiffs, stating that the mistake had not arisen from any intention to defraud or deceive the purchaser, but merely from inadvertence; that Phipson had given no more than the fair value of the estate; that another gentleman was willing to be substituted for him, as purchaser of it; and that it would be more advantageous, for the infant plaintiffs, to repay Mr Phipson his purchase-money, with interest, he accounting for the rents he had received, and to resell the estate, than that the reference sought for should be made to the Master.

The Solicitor-General and Mr Lovat for the petitioner.

Mr Knight, Mr Spence, Mr Milford and Mr K. Parker, *contra*, cited Thomas *v.* Powell, 2 Cox, 394.

The Solicitor-General, in reply, said that the case cited related merely to the title to the estate; and that therefore the party was rightly left to the covenants in his purchase-deed: that here the remedy was collateral to the title: that the party had not sold, in his individual character, but under the decree of the court: and that the court would not have allowed the petitioner to bring an action on account of the misrepresentation, as it would not permit circuity of proceeding.

The Vice-Chancellor. The case cited has no application; for there the party had a remedy under his covenants. The question then is whether, there having been a misrepresentation as to the value of the property, in respect of which the purchaser had a right of action, the circumstance of his having taken a conveyance, has destroyed that right. Now it appears to me that the right of the petitioner in that respect, is not at all affected by that circumstance; and, as the court would not have permitted him to bring an action for damages on account of the misrepresentation, I am of opinion that he is entitled to be recouped out of the purchase-money.

Refer it to the Master to inquire and certify what compensation or equivalent should be made to the petitioner, in respect of the error or mistake, in the particular of sale, with respect to the amount of the rent.

## Sunderland *v.* Newton.

3 *Simons*, 450.

A lessee of a mill and steam engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action to be brought by the lessors to try the right.

April 7, 1830.

BY an indenture of the 15th of May 1818, the plaintiffs demised, to C. T. Clark, a messuage in the parish of Batley, in the county of York, and all out-houses and buildings, and several closes of land, thereunto belonging, and also a mill or factory, situate near to the said messuage, together with the steam engine, boilers, and attached gearing thereto: To hold the same for one year, and thenceforth, from year to year, determinable on six calendar months' notice, subject to the yearly rents therein reserved; and Clark covenanted, with the plaintiffs, that he, his executors, administrators or assigns would, during the continuance of the demise, keep in good repair the messuage and mill, and all the windows, wainscotting, doors, locks and other things thereto belonging, and all the walls, gates, mounds, hedges, and fences of and belonging to the demised premises, and, also, the steam engine, with the boilers and attached gearing in the mill or factory, renewing, at his, or their, own expense, such parts thereof as should be broken or damaged, beyond the unavoidable deterioration to be occasioned by reasonable wear and tear; and the same being so well and sufficiently kept in repair, and renewed, would, at the end, or other sooner determination, of the term, peaceably and quietly leave and deliver up to the plaintiffs.

Clark continued in possession of the premises, under indenture, until his bankruptcy.

The steam engine mentioned in the lease, was an old crank engine of ten horses power; and Clarke, in the early part of 1828, caused alterations to be made in its machinery, the effect of which was to convert it into an engine of 20 horses power, upon an improved principle. In making these alterations the whole of the old machinery was removed and disposed of by Clarke, except the fly-wheel, fly-wheel shaft, boiler and two cisterns. He also, during his tenancy, built a brick mill or warehouse on the premises, part of the foundation of which was placed upon an old building containing a ground room only, and the other part, consisting partly of brick and partly of stones, was let into the earth, upwards of two feet under the surface.

In September 1829, Clarke became bankrupt, and the defendants were chosen his assignees. The bill was filed in February 1830, the lease being still subsisting. It stated that Clarke, during the term and previously to his bankruptcy, had, from time to time, made repairs in the steam engine and machinery, and renewed several parts thereof pursu-

ant to the indenture of lease; that the defendants had obtained possession of the premises, and threatened to sell and remove the steam engine, and the materials with which the warehouse was built, under the pretence that the bankrupt erected the steam engine; whereas the plaintiffs charged that it was only repaired and in part renewed by the bankrupt, and that the same steam engine was, at the time of the demise, and then was annexed to the freehold of the premises, and belonged to the plaintiffs: That the bankrupt had carried on the trade of a woollen manufacturer, and did not use the warehouse and steam engine in his own trade, but let the same, to divers tenants or undertenants, at yearly or other rents. The bill prayed that the defendants might be restrained, perpetually, or during the continuance of the demise, from selling or removing the steam engine and the mill or warehouse, or any part thereof, from off the premises.

The plaintiffs now moved for the injunction.

It was stated in the affidavits made in support of the motion, one of which was made by the bankrupt, that the steam engine, which was then on the premises, was not an entirely new engine, but that sundry articles calculated to increase the power of the old engine to 20 horses power, had been substituted for those parts of the old engine that had been removed: That, if a new fly-wheel, fly-wheel shaft, boiler and cistern had been furnished at the time when the alterations and improvements were made, the expense would have been increased by about 200*l.*: That the alterations were made, not because the old engine was worn out, but for the purpose of increasing its power: That the old engine sometimes stopped, not because it was worn out, but because more weight of machinery was applied to it than an engine of 10 horses power could carry: That the boilers had been set up about 17 years, and still continued good, and were only applicable to an engine of 10 horses power, though used for one of 20 horses power: that the bankrupt had not, for the last five years, manufactured or finished any cloth in the mill or the other buildings comprised in the lease: that the fly-wheel, fly-wheel shaft and boiler were material and necessary component parts of the steam engine, and that it could not be worked without them: that the fly-wheel, fly-wheel shaft, boiler and cisterns, together with the new parts, formed one entire engine, and that the new parts could not be removed without injury to the premises, inasmuch as the same could not be removed without pulling down and removing part of the buildings wherein the engine was erected, and that the premises would not be worth anything like their present rent, if the new parts of the engine were removed.

John Stirk, an engineer, made an affidavit in opposition to the motion, in which he deposed that, in the spring of 1828, his father built and set up, for the bankrupt, on the demised premises, a completely new patent steam engine of 20 horses power, of the newest and most improved construction, in the place of an old, common, atmospheric engine which stood there before; for which new engine he charged 548*l.* 0*s.* 11*d.*, besides the mason's, joiner's, and plumber's charges for putting up and perfecting the engine: That the deponent acted as the engineer: That no part whatever of the old engine was used in the erection of the new engine, which was, when built and completed, at-

tached to the fly-wheel, fly-wheel shaft, and boiler, which had been previously used with the old engine: That the boiler attached to an engine requires to be frequently renewed, and sometimes the fly-wheel and shaft also: that the entire steam engine so set up, might be taken away, and another substituted in its place, without the slightest injury to the premises, or to the fly-wheel, shaft or boiler: that he saw the old engine at work, several times before it was pulled down: that it was worn out by long use, and was wholly incompetent to turn the machinery attached to it: that it frequently stood still, and ceased to work, in consequence of the important parts of it being worn out: that it was taken down and all the materials removed.

By another affidavit made by the defendants and some of the workmen employed in putting up what was called the new engine, it was sworn that such was the state of dilapidation into which the old engine had fallen, by long use, that it frequently stopped entirely, so that it became absolutely necessary to build a new engine, as the bankrupt underlet the mill to different persons, and undertook to supply, at his own expense, the power necessary to work their machinery: That the bankrupt accordingly caused a completely new and entire patent steam engine, of 20 horses power, to be set up, which was attached to the fly-wheel, fly-wheel shaft, and boiler that had previously been used with the old engine: that, in the course of the spring of 1828, the bankrupt erected an additional brick mill, adjoining the old mill, for the purpose of putting machinery therein, one half of the foundation of which was placed upon an ancient building containing a ground room only, and the other half, upon the contiguous land: that 780*l.* and upwards were expended in setting up and completing the new patent engine, and upwards of 300*l.* in building the additional mill: That, at the time such expenditure took place, the bankrupt was liable to be turned out of the possession at the end of the then current year: that the whole of the new patent engine and the materials of the new mill might be removed, without the slightest injury to the demised premises: that the deponents had been informed and believed that the cloth manufactured by the bankrupt was made, manufactured and finished in the said mill and other trade buildings: that, when the engineer began to set up the new mill, the engine-house was a complete shell, and contained no materials whatever except the fly-wheel and fly-wheel shaft, the boiler being on the outside of the engine-house: that the water cisterns formed no part of the steam engine: that the boiler frequently required to be renewed, and that the fly-wheel, and fly-wheel shaft sometimes required to be renewed in consequence of breakages, but that all those operations were performed without producing any injury whatever to the engine itself, to which they were only attached.

Mr Knight and Mr G. Richards, for the plaintiffs, in support of the motion, said that it was quite clear, from what was stated, in the affidavits, relative to the new building, that it could not be removed: that additions only had been made to the old steam engine: that the parts of the old engine that remained, were essential parts of the machine: that the alterations were made for the purpose only of increasing the power, and that they were not rendered necessary by wear and tear.

Mr Pepys and Mr O. Anderdon for the defendants, in opposition to the motion:

The new building was erected for the purposes of trade, and, therefore, it may be removed, although it was let into the ground. The engineer and all the workmen swear that the steam engine now on the premises, is a new engine, although it was attached to part of the old work. If it is so unattached as to be capable of being removed without injury to what remains, there is no doubt it may be removed.

The cases cited in the course of the argument were Penton *v.* Robart, 2 East. 88; Elwes *v.* Maw, 3 East. 38; Thresher *v.* the East London Waterworks Company, 2 Barn. & Cres. 608; Storer *v.* Hunter, 3 Barn. & Cres. 368.

The Vice-Chancellor. The question upon this motion for an injunction must be determined by the covenant in the lease.

By the lease a messuage, mill, and certain buildings, together with a steam engine and other articles, were demised, by the plaintiffs, to the bankrupt, for a term not yet expired: and the tenant entered into the following covenant to repair. [His honour here read the covenant.] It is admitted that part of the building existed at the time of the demise, and that it was increased both laterally and upwards. The tenant removed what is called the engine, which is detachable from the boiler and other works, and substituted a new engine. If the engine had been worn out by wear and tear, there would have been no obligation, on the tenant, to renew it: but the tenant takes away the existing engine, and substitutes another for it, which was of greater power than the old engine. The substituted engine is, in my opinion, subject to the stipulations, in the lease, as to the old engine. It can only be considered as a more extensive repair of the old engine. With respect to the new building, that too must be protected by the same covenant as protected the old one. I am, therefore, of opinion that I can not allow the assignees to remove either the engine or the new building, and consequently I shall grant the injunction, the plaintiffs undertaking to bring such action as they may be advised; and the defendants must admit, at the trial, that they have removed the new part of the engine, and the new part of the building.*

## Bown *v.* Child.

3 *Simons*, 457.

Motion by a defendant, before answer, to examine a witness *de bene esse*, granted. April 7, 1830.

THIS was a suit, by residuary legatees, against executors, for an account of a testator's personal estate. The testator had carried on

* The defendants declined to try the action; and, at the hearing of the cause, the injunction was made perpetual.

business, at Charleston, in South Carolina, in co-partnership with one Whitfield. *Before the executors had put in their answer*, an application was made, to the court, on their behalf, by Mr Ching, for leave to examine the son of Mr Whitfield, as a witness, in the cause, *de bene esse*, on the ground that he was about to leave the country, and to proceed to America.

The Vice-Chancellor, when the motion was first mentioned to him, declined to grant the order: but, on this day, Mr Ching stated that he had obtained, an order for the like purpose, under similar circumstances, from Sir A. Hart, Vice-Chancellor, on the 16th of August, 1828, in the cause of Lord Teynham *v.* Tyler, notwithstanding his application was opposed. Upon which the Vice-Chancellor said that the case referred to was an authority for him, and granted the motion.

Mr Ellison opposed the motion and referred to 2 Fowl. Exch. Pract. 102.

## Martin *v.* Nicolls.

3 *Simons*, 458.

A foreign judgment can not be questioned in the courts in this country. Therefore a bill for a discovery and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment, is demurrable.

April 30, 1830.

THE bill stated that, in 1829, the defendants, who were the personal representatives of P. Nicolls, deceased, and were resident in the island of Antigua, brought an action, in the court of common pleas in that island, against the plaintiff, who was carrying on business at Glasgow, in order to recover a sum of money which had been paid to the plaintiff, by P. Nicolls, for the purchase of an estate in Antigua, but which estate was afterwards recovered, from P. Nicolls, or those claiming under him, by some person claiming adversely to the plaintiff's title. The bill further stated that a summons having been served upon the plaintiff's agent in Antigua, the action was tried there, and that, evidence having been given, on behalf of the plaintiffs in the action, to prove the amount of the purchase-money paid, by P. Nicolls, to the plaintiff in this suit, a verdict was recovered against the plaintiff, and that judgment was afterwards entered up, on the verdict, for 2,700*l.* currency: that the defendants in this suit, had lately commenced an action, against the plaintiff, in the court of common pleas at Westminster, upon the judgment obtained in Antigua: that the plaintiff was advised that, under the circumstances set forth in the bill, the defendants were not entitled to recover from the plaintiff, the sum for which the judgment had been so obtained, there being, in fact, no debt or sum of money, whatever, due from the plaintiff, to P. Nicolls, or his estate, or to the defendants, as his personal representatives, at the time of the action being brought in Antigua, or at any other time. The bill then contained a variety of

charges in support of the last-mentioned statement, and charged that the claim or demand of the defendants was wholly void and without foundation, either according to the laws of Antigua, or otherwise, and that the plaintiff was advised that the several facts and circumstances before stated in the bill, if properly substantiated by evidence, on the trial of the action in this country, would enable the plaintiff to make a complete defence thereto, but that the persons who could prove those matters, were all resident, in Antigua, or other places, beyond the seas; and that the plaintiff was, therefore, unable to prove the several matters aforesaid, or to make any sufficient defence to the action, without a discovery from the defendants, and also a commission to examine witnesses, in Antigua, and other places beyond the seas. The bill then contained the usual charge that the defendants had books and other documents in their custody: and it prayed, in the usual manner, for a discovery, from the defendants, of the several matters contained in the bill, and for a commission to examine witnesses in Antigua and other places beyond the seas, and for an injunction to restrain the defendants from proceeding in the action in this country.

The defendants put in a general demurrer to the bill.

Mr Knight and Mr Koe, for the defendants, in support of the demurrer:

This bill is filed not for relief, but for a discovery and a commission; and it can not be supported unless it is shown, first, that the judgment can be questioned in this country; and, second, that the facts stated afforded a defence to the action on the judgment*. The judgment was right: but, taking it to be wrong, the course which the plaintiff ought to have followed, was to appeal to the privy council. Galbraith *v.* Neville, 1 Dougl. 6, note, and 5 East. 475, note, Walker *v.* Witter, 1 Dougl. 1, Tarleton *v.* Tarleton, 4 Mau. & Sel. 20, Farquharson *v.* Seton†, Lousada *v.* Templer, 2 Russ. 561.

The Solicitor-General and Mr Crompton, for the plaintiff:

Both upon principle, and upon the authority of the case on the subject, the judgment is not binding. The judgment having been obtained in a colony, the debt is a simple contract debt only. The judgment is only evidence of the debt: it is not conclusive; and where the party in whose favour it is given, comes into a court in this country to enforce it, the grounds of it way be examined. There is no foundation for the objection that we might have appealed to the privy council, for we are not proceeding in the colony. The bill states that all the matters are to be proved by documents in the island, and therefore there is a clear case for a commission. Sinclair *v.* Fraser, 1 Dougl. 5, Herbert *v.* Cook, Willes's Rep. 37 n. Philips *v.* Hunter, 2 H. Black. 402, see 410, Phillipps on Evidence, 6th edit. 331, *et. seq.* In Tarleton *v.* Tarleton the action was brought on a covenant, entered into by the defendant, to indemnify the plaintiff against debts due from a partnership in which

* On persuing the judgment, it will be seen that is was not necessary to report the arguments on the second head.

† At the Rolls, but not reported.

the plaintiff had been engaged with the defendant and another person, in the island of Grenada. The judgment was a mere collateral matter, and the party was not asking for the benefit of the judgment.

It is distinctly charged, in the bill, that the claim of the plaintiff to be repaid the money, is invalid: that objection is sufficient to support the bill.

The Vice-Chancellor. This bill was filed, respresenting in effect, that an action had been brought, by the defendants in Antigua, and that a judgment had been recovered; and that afterwards an action was commenced, in the court of Common Pleas in this country, upon that judgment, against the plaintiff in equity; and the object of the bill was to obtain a discovery and a commission to examine witnesses in Antigua. The bill stated merely what I have mentioned, namely, the proceedings in the island, that judgment had been recovered, and that an action had been brought, here, upon that judgment. The question is whether, where a judgment has been recovered in a foreign court, and an action is brought, upon that judgment, in one of the courts of this country, this court will entertain a bill for a discovery and a commission to examine witnesses abroad, in order that their evidence may be used in the action, in Westminister Hall, on the foreign judgment. In support of the bill it was alleged that what fell from the court in the case of Walker *v.* Witter, supports the plaintiff's case. There Lord Mansfield said: "The judgments of courts of record in England can not be controverted. Foreign courts, and courts in England not of record, have not that privilege. Foreign judgments are a ground of action every where, but they are examinable." There was also cited a case of Herbert *v.* Cook, which is in a note to Moravia *v.* Sloper, Willes, 30, see 37 n., which was decided in 1782, and was quoted only to show that Lord Mansfield there asserted the same doctrine. The case of Moravia *v.* Sloper, rather seems to go against the proposition which Lord Mansfield laid down. It appeared, in that case, that it was not averred that the court below had jurisdiction, but that, if it had not been from that circumstance, the judgment of Willes would have been different.

The case of Philips *v.* Hunter, in error, was also referred to. The decision in that case however has nothing to do with the question before me, and is the known law of the land.

In opposition to these cases, and to what Lord Mansfield said, there was cited the case of Galbraith *v.* Neville. In that case Lord Kenyon says: "I can not help entertaining very serious doubts concerning the doctrine laid down in Walker *v.* Witter, that foreign judgments are not binding on the parties here." And, after referring to the Duchess of Kingston's case, he says: "That is not an authority, for saying that we can revise the judgments of the lowest courts in foreign countries, were they have competent jurisdiction."

In this case, however, Mr Justice Buller expressed a strong opinion in favour of the doctrine laid down in Walker *v.* Witter, namely, that the judgment of a foreign court was to be considered as *primâ facie* evidence only. It appears that Eyre, C. J. who dissented, in Philips *v.* Hunter, from the majority of the judges, was of the same opinion

with Lord Kenyon, for he says: "If, notwithstanding the bankruptcy, the debtor remained liable to an attachment, according to the laws of that country, the judgment was proper. If, according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided in the cause instituted in Pennsylvania, by the courts of that country, and not by us. We can not examine their judgment; and, if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice what the law of Pennsylvania is upon this subject."*

This shows what was the individual opinion of that judge on the point. But in Tarleton *v.* Tarleton, we have a short, energetic observation, by Lord Ellenborough, stating what was the law and the reason of it. That learned judge says: "I thought that I did not sit, at *nisi prius*, to try a writ of error, in this case, upon the proceedings in the court abroad."

It is observable that the doctrine laid down, by Lord Kenyon and Lord Ellenborough in the cases alluded to, is by no means a new doctrine; for it appears, from a valuable note, in Kennedy *v.* Cassillis, 2 Swanst. 325, that the same law was considered binding, in the time of Charles II. by Lord Nottingham. [Here his Honour read the two cases stated in the note referred to.] It does appear, most distinctly, that the old law is in favour of the proposition that a foreign judgment is not examinable in the courts of Westminster Hall. It is admitted they have no appellate jurisdiction. If the judgment below is wrong, it ought to be set right by an appeal to the king in council.

The old authors and the opinions of Lords Ellenborough and Kenyon, greatly overweigh the proposition to be extracted from the judgment of Lord Mansfield, and the expression of opinion by Mr Justice Buller.

If I were to allow this bill to stand I should be, in effect, saying that the judgment obtained in Antigua, may be overruled by the court of

* But, shortly afterwards, Eyre, Chief Justice, says, "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *primâ facie* sufficient to raise a a promise. We examine it as we do all other considerations of promises, and, for that purpose, we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law." See 2 H. Black. 410.

Mr Phillipps, in his Treatise on Evidence, 6th edit. p. 333, says: "It is now fully established that a judgment in a foreign court, is only *primâ facie* evidence of a debt, and has the force of a simple contract between the parties." Mr Starkie, however, in his treatise on the same subject, vol. 1, p. 208, says: "The question, also, whether the judgments of foreign courts, when actions are brought upon them here, are conclusive, or merely *primâ facie* evidence of the debt, has been subject to some doubt, but the former position seems to be best supported, both by principle and by analogy to decided cases. That the evidence in these cases is merely *primâ facie*, is a position which rests chiefly on the authorities of Walker *v.* Witter, Sinclair *v.* Fraser, and a dictum of Eyre, C. J., in giving judgment in

common pleas. I must, therefore, allow this demurrer: but, as there is an appearance of authority for the plaintiff, I give no costs.*

## Marcos *v.* Pebrer.

3 *Simons*, 466.

*May* 8, 1830.—The bill in this cause had been demurred to, for multifariousness.

Mr Knight and Mr Ching appeared in support of the demurrer, and Mr Pepys and Mr Kindersley in support of the bill.

In the course of the argument the case of Turner *v.* Robinson, 1 Sim. & Stu. 313, was cited.

The Vice-Chancellor in his judgment, stated the facts of that case, and said that he could not coincide with the decision; as he could not see how, consistently with the rules of the court, the personal estate of A. could be joined, in the same suit, with the personal estate of B.: that there might be questions respecting the personal estate of B., with which the parties interested in the personal estate of A. were not at all concerned: and that, therefore, he did not think that he was bound to adopt the principal of Turner *v.* Robinson.

## Bolton *v.* The Corporation of Liverpool.

3 *Simons*, 467.

The defendants had brought an action against the plaintiffs to recover a sum alleged to be due for town dues. The plaintiffs filed their bill, alleging that the defendants had in their custody cases for the opinion of counsel, by which it would appear that the defendants had no right to levy the dues, and also various charters, deeds, &c. by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody, several cases, two of which were prepared many years ago, and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared pending, or in contemplation of the existing proceedings, and that they also had, in their custody, charters, deeds and copies of accounts from public offices, which evidenced their title to the dues. A motion, by the plaintiffs, for a production of all the documents, was granted as to the two old cases only.

December 22, 23, 1831.

THE plaintiffs were merchants and copartners at Liverpool. The defendants, the corporation, had lately brought an action, in the King's

the case of Philips *v.* Hunter. It is to be observed, in the first place, that these authorities are all extra judicial."

* The judgment is given *ex relatione.*

Bench, against the plaintiffs, for the purpose of recovering a sum of money, which they alleged to be due to them, for tolls on duties, in respect of goods exported from and imported into the port of Liverpool, by the plaintiffs. The bill was filed, against the corporation and the town clerk, for a discovery, in aid of the defence to the action, and for an injunction to restrain the action. It charged (amongst other things) that divers cases had been lately submitted, to counsel, for their opinion on the right of the corporation to receive the tolls and duties, and from which, if produced, it would appear that they had no such right; and that all such cases were then in the possession or power of the defendants; that the defendants had, in their possession or power, divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers and writings relating to the matters contained in the bill, and by which, if produced, the truth of those matters would appear.

The defendants put in a demurrer to part, and an answer to the remainder of the bill. In the answer they denied that any case had been, at any time, submitted to counsel, for their opinion, relating to the duties and customs, other than such as related to the right of the corporation to receive the duties and customs; but they admitted that they had, in their possession, various charters, books of account, letters, copies of bills, answers, papers and writings relating to the matters mentioned in the bill, "other than and besides such of the particulars aforesaid, being in the possession or power of the corporation, as were, or formed, or contained any statements of the title under which the defendants claimed the dues or customs aforesaid, or as related to any of the matters stated in the bill which were demurred to: And these defendants have, in the second schedule* to this their answer annexed, and which they pray may be taken as a part thereof, set forth a list and description of the said charters, books, accounts, copies of bills, informations, answers, papers and writings, other than as aforesaid, so being in the possession or power of these defendants, the mayor, bailiffs and burgesses." The demurrer having been overruled by the Vice-Chancellor, and his honour's order having been affirmed, by the Lord Chancellor, the defendants put in a further answer, in which they stated the right of the corporation to levy the duties in question, not to be founded in prescription, as had been before erroneously supposed, but to be derived from a grant, made by King Charles the First, as Duke of Lancaster, to the Molyneux family, from whom it was afterwards purchased by the corporation. In their further answer they admitted that they had in their possession, a copy of a case or statement in the shape of a letter, which appeared to have been written, in or about 1789, by Mr Henry Brown, who then acted as solicitor of the corporation, to Mr. Hargrave, the counsel, and which, as the defendants supposed, was prepared for the purpose of having the opinion of Mr Hargrave, on the subject of the then pending disputes between the corporation of Liverpool and the freemen of London, relative to the ex-

* The first schedule contained only the tables of duties claimed by the corporation. The demurrer included the inquiries, in the bill, as to cases, charters, grants, &c. in the possession of the corporation, relating to their title to levy the tolls and duties.

emption of the latter from duties, in which case the title of the corporation, to the tolls and duties, was, by a mistake of Mr Brown, as the defendants believed, supposed to be vested, in the corporation, by prescription: that, in October 1804, a case was submitted, by the defendant, Statham, as town clerk, to certain counsel, for their respective opinions on a question relative to the reduction of some of the dues, in consequence of a memorial, from the merchants, to the common council of the corporation; in which last-mentioned case also it was stated, by mistake, that the corporation of Liverpool, were entitled, to the duties, by prescription: that, at the time of the preparation of the last-mentioned case, the defendant, Statham, had not discovered the real title of the corporation, to the duties: and such last-mentioned case was then in the possession of the defendants; but the defendants submitted that, as that case and the former one were made out in ignorance of the title, and by mistake with regard to certain other matters therein mentioned, and as they related to other questions, they ought not to be produced. The defendants admitted that divers cases or statements had lately been submitted to counsel, by the corporation, for their opinion on the subject of, or relating to, the right of the corporation to levy and receive the dues and customs aforesaid; and that all such cases or statements were then in the possession or power of the defendants: that they had, in the second schedule* to their further answer annexed, and which they prayed might be taken as part thereof, set forth a list of such last-mentioned cases or statements; but that such cases or statements so scheduled as aforesaid, were prepared in contemplation of, and with reference to the action in the bill mentioned, and with reference to this suit: and the defendants submitted that they ought not to be compelled to produce the same. However, the defendants denied that, if such cases and statements, and the cases prepared by Brown and Statham, were produced, it would appear that the corporation were well aware, or had reason to believe or suppose, or that the fact was that they had no right to levy or receive such town dues, tolls or duties, or customs, or otherwise than as aforesaid; but that, on the contrary, it would appear that the corporation had the right as then contended for by them. The defendants admitted that they had then, in their possession, certain grants, deeds, documents and papers relating to the matters aforesaid; and that they had, in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents and papers. But the defendants said that many of such grants, deeds and documents were the title-deeds and documents evidencing and showing the title, of the corporation, to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had, in the said schedule, particularized and distinguished which of the said grants, deeds and documents were the title-deeds and documents evidencing the title of the corporation to the town and lordship of Liver-

* The first schedule to the further answer contained a list of books belonging to the corporation, containing accounts of sums received by them, for the duties in question, from 1800 to 1831; and which the defendants were willing that the plaintiffs should inspect.

pool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents and papers.

The third schedule was headed: "List of copies of documents and papers from public offices, evidencing the title of the defendants, the mayor, bailiffs and burgesses of Liverpool, to the town and lordship of Liverpool, and the town dues or customs in question." It was divided into five parts; the first of which was headed: "ministers and receiver's accounts." The second: "Grants, deeds, and other documents." The third: "Copies of other deeds and documents evidencing the title of the defendants, the mayor, bailiffs and burgesses of Liverpool, and in their possession." The fourth: "Copies of accounts from the books of the stewards of the Molyneux family (under whom the corporation had been lessees) from the year 1581 to 1685, both inclusive." "The fifth: "Copies of the bill, answers, interrogatories, depositions and decree, in a suit in the duchy court of Lancaster, between Sir Richard Molyneux and another, and the defendants, the mayor, bailiffs and burgesses of Liverpool, from the 1 & 2 Philip and Mary, to 2 & 3 of ditto."

The corporation did not object to produce the documents mentioned either in the first schedule to the first answer, or in the first schedule to the second answer; and a motion was now made, that the plaintiffs and their agents might be at liberty to inspect, at Liverpool, and to take copies of and extracts from the documents mentioned in the second answer, and in the second and third schedules thereto, and that those documents might be produced at the trial of the action.

Mr Pepys and Mr Kindersley, for the plaintiffs, in support of the motion.

The bill alleges that there are certain documents in the custody of the corporation, which afford evidence to negative their right to claim the duties in question. The only ground on which this application can be resisted, is that these documents constitute evidence to prove the defendants' title. But we ask to have them produced, not because they constitute the defendants' title, but because they constitute our defence to the action. If these documents constitute the defendants' title, and ours also, we have a common interest in them, and are entitled to see them. The defendants' title is founded either on grant or prescription. If on grant, we can negative it on production of the documents in which alone the grant would be contained: if on prescription, we can negative it, by reference to the accounts kept by the corporation. It is not disputed that we are entitled to see the documents in the first schedule to the first answer. The description, in the body of that answer, of the second schedule, does not say that the documents mentioned in it, are not material to our defence, but that they constitute the title of the defendants. Though they do constitute their title, yet they also contain what is material to our defence, and consequently, we are entitled to see them.

The production of the cases submitted to counsel by Brown and Statham, can not be objected to on the ground that they were stated with reference to the present proceedings; for, they were stated long

before those proceedings were in contemplation. But the production of them is resisted on the ground that they contain mistaken statements. That is no reason why these cases should not be produced. They may not be conclusive against the defendants: but no documents could be produced which, *primâ facie*, would be stronger evidence against the party out of whose custody they come. The statements in these case may be all erroneous: but no one can say that their contents are not evidence, and that they are not important documents for the adverse party; as he may show, from them, what was the representation made, by the party with whom he is contesting, as to what was the then opinion of that party as to the right which is now the subject of litigation.

The corporation did once claim by prescription; and they may again put forth that title, at the trial of the action now pending, or they may abide by the title by grant. But, whichever course they adopt, these cases are material documents for the plaintiffs, as they may show by them, that the parties themselves do not know their own title; that, at one time, they claimed by prescription, and, at another time, by grant.

Having disposed of the cases which are said to have been stated under a mistake, we come to those which are said to have been stated with reference to, or in contemplation of the present proceedings.

It is no objection to the production of a case, that it has reference, solely to the particular suit. If it could be proved, *aliunde*, that a party had made a statement that would be unfavourable to his own case, or rather which would be favourable to the case of his adversary, that statement might of course, be proved by evidence *aliunde*. But if there is no such evidence of the statement, owing to its resting, entirely, in the knowledge of the party himself, then it is a common rule of a court of Equity that he shall discover, in his answer, the particulars of the statement, and, if there is any written document in his possession, which goes to show those particulars, that he shall produce that document. To justify their not producing these documents, they merely say that the cases were submitted to counsel in contemplation of this suit. If the parties made a statement, which tends to assist their adversary's case, what does it signify that it was made in contemplation of a suit, or of any other particular matter? If the corporation made statements which go to show that the whole world are exempt from the payment of these duties, we are entitled, as a matter of course, to have those statements produced, and more especially if they contain a statement of, or a reference to documents which would tend to show that they are not entitled to levy these duties. When the demurrer was argued before the Lord Chancellor, he was struck with the proposition, that a defendant is compellable to produce cases stated with reference to the particular suit then pending. But his lordship over-ruled the demurrer, *in toto*, and did not give the defendants permission to put in a more limited demurrer.

Next, with respect to the documents mentioned in the third schedule to the further answer. The defendants say that many of such documents and papers are copies of accounts from public offices. Now these public offices are in fact private ones, as no one has a right to go to them. The crown is only an individual, so far as the possessions of the Duchy of Lancaster are concerned, out of which this property was

carved and given to the corporation of Liverpool. These papers are not alleged, in the body of the answer, to be papers evidencing the title of the defendants, but they are distinguished, in the body of the answer, from the documents of that description. They resemble, in some respects, receipts for moduses, which each party has a right to inspect, in order to see whether the modus has or has not varied. If we can show, from these accounts, that there has not been a perpetual, uniform perception of these dues, we destroy not only the title by prescription, but also the title under the grant from Charles the First, and thereby we set up our own title, which is to be exempt from the payment of these dues. If there has been a variation in the perception of these tolls by the persons under whom the defendants claim, then the title by prescription is destroyed. The payments were made by persons standing in the same situation as the plaintiffs. The plaintiffs may be said to represent all the world. These payments are not merely *inter alios:* and therefore the plaintiffs have a right to see what payments have been made by them, and also by those whom they represent or rather stand in the place of, in order to show that there has been a variation and break in the perception of them, by which the title by prescription will be destroyed.

Next as to the grants, deeds and documents comprised in the third schedule. These are set forth, in the schedule, under two distinct heads: first, "Grants, deeds and other documents:" second, "Copies of other deeds and documents evidencing the title of the defendants." It is clear, therefore, that the documents contained under the first head, do not evidence the title of the corporation. First, as to those documents that do evidence the title of the corporation: for if we succeed as to them, *a multo fortiori*, we shall be entitled to have the others produced. If, anterior to the grants made to the corporation, the crown (as we say these grants will show) never exercised the right which the corporation now claim; then no such right was conferred by the grants. The grants therefore are part of our evidence. The corporation did, formerly, claim by prescription; and they may attempt to support their claim by that title, in the action at law. Are we not then entitled to a production of these early documents, in order to negative the prescription, or to show that they do not know their own title. Then the defendants say that many of these grants and documents are the evidence of their title to the town and lordship of Liverpool, and to the town dues and customs aforesaid. Now it is true that a defendant can not be compelled to produce documents that relate, exclusively, to his title. But it is equally true that if they do not relate exclusively to his title, but will tend to show that the plaintiff's is a better title, the court will compel the production of those documents. In a case in which A. is claiming title to an estate, against B., who is in possession of the estate and also claims title to it, it is not sufficient for A. to destroy B.'s title; for by so doing, he will not establish his own. But in this case, the title of the corporation is against common right, and the destruction of it is the title of the plaintiffs. Their title is a title to exemption, which is defeated by the corporation having the right. If the corporation have not the right, then the plaintiffs' title to exemption succeeds. For these reasons we apprehend that we are

entitled to a production of those documents to which the strongest objection applies, namely, that they evidence the title of the defendants. And, if we are entitled to see those documents, we are, of course, entitled to see the other class of documents to which that objection does not apply.

Then we come to the next branch of the third schedule, which contains copies of accounts from the books of the stewards of the Molyneux family, under whom the corporation were lessees. The observation made as to the other accounts, applies to these also, namely, that we are entitled to inspect them, in order to show that there has been a break, or variation, in the course of the payment of the duties.

Next as to the copies of bills and answers interrogatories, depositions, and decree in a suit in the duchy court of Lancaster, between Sir Richard Molyneux and another, and the defendants, the corporation.

The production of these documents will probably be objected to, on the ground that copies of them may be procured from the duchy court. But, although evidence which the defendant has in his possession, may be procured from another quarter, the court will compel him to produce it, and would not permit him to put the plaintiff to the expense of procuring it *aliunde*.

Sir Charles Wetherell and Mr Duckworth for the defendants:

This is a case in which the corporation having brought an action, against the plaintiffs, to recover certain tolls, the plaintiffs filed their bill, alleging that the corporation had no title, at all, to the tolls, or, rather, seeking to discover what that title was. A demurrer was put in to the bill, so far as it regarded the question of title: and it was determined, by your Honour, and afterwards by the Lord Chancellor, that the defendants must answer fully. Now they have answered fully; and the question is, whether the corporation are to be compelled to produce their documents. The corporation have stated, in their answer, that they have been in receipt of these tolls, for nearly three centuries, first, as lessees of the Molyneux family, who held them under grants from the crown, and, afterwards, as purchasers of the fee from the Molyneux family. Now, as to the documents mentioned in the first schedule to the first answer, they do not relate to our title; and we do not resist the production of them. But as to the charters and other papers in the second schedule to the first answer, though they may relate to some of the matters in the bill mentioned, yet they are utterly immaterial to the plaintiff's case, and no reason is stated why they should see them; and, as it may be very important, to us, that they should not be produced, we contend that we ought not to be compelled to produce them.

Next, with respect to the documents mentioned in the second answer. The accounts relate to the rents received on the different leases which have been granted, from time to time, of these tolls; they are, therefore, part of our title. The objection to the production of the copies of documents from public offices, is twofold; first, that they are in public offices, and are, therefore, accessible to the plaintiffs; and, secondly, that they are evidences of our title, and that the plaintiffs have shown no common interest in them. Now, in the court of exchequer, where a defendant has, in his possession, Extracts from Doomsday Book, The

Parliamentary Survey, or other records of the like nature, on a motion for production of documents, those papers are either not asked for, or, if they are asked for, they are refused, because they are obtained from public offices, and it would not be just that a defendant should purchase them for the benefit of the plaintiff, who has just the same access to the originals as the defendant has.

[The Vice-Chancellor:—What authority do you rely upon, when you say that it has been the practice to refuse the inspection of such documents?]

We rely on no particular case, for it is the universal practice, and is of almost daily occurrence in the Court of Exchequer.

[The Vice-Chancellor:—If there is a written document which the defendant has paid for, but which relates to the plaintiff's title, the defendant is bound to produce it for the inspection of the plaintiff.]

The other ground of objection, and which applies to all the other documents mentioned in the second answer is, that they relate to the title of the corporation. The ground on which the plaintiffs put their right to the inspection of these documents, is, not that they have any interest in them, or that they claim title to these tolls, but because they are endeavouring to impeach our title to them. It is, however, contrary to the established principles of this court, that a party should be required to produce documents which may tend to impeach his own title, unless it is shown that his adversary has an interest in them. If a party is in possession of an estate, and an ejectment is brought against him, and he files a bill of discovery against the plaintiff in the action, he can not compel a production of his adversary's title-deeds by merely alleging that they would show that the latter had no title to the estate. The plaintiffs, here, admit that they have no title to the tolls. And it is clear that, if they had a title, they could not obtain a production of these documents solely for the purpose of impeaching the defendants' title. Does then the fact of the plaintiffs having no title, give them a right to an inspection of these documents? It is not impossible that there may be blots in the title of the corporation to these tolls, in which case the Molyneux family might claim them.

We now come to the cases: and, first, those stated by Mr Brown and Mr Statham. It is true that the title of the corporation was stated, in them, to be by prescription, but they do not claim by that title now. Besides those cases related to questions with which the plaintiffs have nothing to do. One of them had reference to a dispute between the Corporation and the Freemen of London, and the other, to the power of the corporation to diminish the tolls. The plaintiffs have no interest in the questions to which those cases relate, and therefore, are not entitled to see them.

Then, as to the other cases. They were all stated either in contemplation, or during the pendency of the present proceedings at law and in equity, and, consequently, the defendants ought not to be compelled to produce them. Hughes *v.* Biddulph, 4 Rus. 190; Vent *v.* Pacey, ibid, 193; Williams *v.* Mundie, 1 Ryan & Mood. 34, and see Garland *v.* Scott, *ante*, page 171. It was stated, on the other side, as the ground on which these cases ought to be produced, that, if a defendant makes declarations, however near the trial, they may be given in evidence against him. Now it is quite true, that, if a party makes decla-

rations in public, they may be received in evidence against him; but it has always been considered to be the law, and to be necessary for the well being of society, that communications which pass between a client and his solicitor, should be protected. Both principle and practice, therefore, are against the production of these cases.

We submit that the plaintiffs are not entitled to have an inspection of any of the documents, except those that are contained in the first schedule to the first answer, and in the first schedule to the second answer.

Mr Pepys, in reply:

If documents are material to the purpose for which the plaintiff seeks a discovery, he is entitled to have them produced, although they relate to the defendant's title. The ground on which a defendant is not entitled to the production of his adversary's papers, is not because they relate to his adversary's title, but because they are not material to his own. It is upon this principle that an heir-at-law is not entitled to an inspection of deeds. His title is independent of all deeds: and he has nothing to do but to prove the seisin of his ancestor. A tenant in tail, who has been barred by a recovery, is entitled to see the deed by which the estate tail was created, although it is the foundation of his adversary's title as well as of his own. In The Princess of Wales v. Lord Liverpool, 1 Swanst. 114, the plaintiff was suing on a bill of exchange, which was the foundation of her title; but it appeared, to the court, that there were certain circumstances connected with that document, which might afford the defendant at law a ground of defence, by impeaching the plaintiff's title to sue; therefore Lord Eldon directed a production of that document.

It is nowhere alleged, in the answer of the corporation, that the production of the documents in question would not assist the plaintiffs' defence to the action. It is idle, in this case, to talk about the title to this property. It is not the title that is in dispute; but the question is whether, by the grant under which the corporation claim, any right is conferred to exact certain heavy dues. Their title is not at all in discussion. The only question is, whether the right to exact these dues, is incident to their title.

Then to the cases. It can not be denied that we are entitled to see those that were stated by Brown and Statham. The question with respect to the others, is one of greater difficulty. Now, the ground on which a solicitor is protected from divulging communications made to him by his client, is that they are confidential; and they are equally protected at whatever distance of time they have been made. But the house of lords has decided that statements of facts for the opinion of counsel, are not within the protection. Radcliffe v. Fursman, 2 Bro. P. C. 514. The same principle that applies to cases stated some years back, is equally applicable to cases stated pending, and with reference to existing proceedings. If, as the fact is, they are not protected because they are confidential communications, they are not protected at all. The time at which they were submitted to counsel can not be material. Cases are never submitted to counsel unless there is an expectation of a dispute arising. How can it be material whether that expectation is realized now, or ten years hence. The Attorney-General v. Berkeley, 2 Jac. & Walk. 291. The cases that have been cited for the defendants, do not at all interfere with the doctrine laid down by

Lord Eldon, in the Princess of Wales *v.* Lord Liverpool. In Hughes *v.* Biddulph it was decided that confidential communications between the defendant and her solicitors, or between the country solicitor and the town solicitor, in their relation of client and solicitors, either during the cause, or with reference to it, though previous to its commencement, ought to be protected; but all the other papers were ordered to be produced. That case can have no effect upon the one now before the court: for all confidential communications are protected, upon what occasion soever, or at what time soever they are made. Nor has the case of Vent *v.* Pacey any closer application to the present question. It was there held that the plaintiff was not entitled to the production of a letter, admitted by the defendant to be in his possession, but which was written by him to his solicitor, and which directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. Neither of those decisions shows that a case stated for the opinion of counsel after a suit is in contemplation, or has been commenced, ought not to be produced. In both those cases the documents were protected on the ground of their containing confidential communications between the solicitor and client. In Beresford *v.* Newton,* which was very recently before Lord Lyndhurst, C. B., and which was a case where parishioners filed a bill against their rector, stating that he had in his possession certain cases touching the matters in question, which he, or his predecessors had stated for the opinion of counsel, at some former time, and certainly before the suit was commenced, his lordship ordered a production of those cases. If A. takes the opinion of counsel, on a matter which is expected to be a subject of litigation between him and B., and afterwards the litigation arises, B. can compel a production of that case: for it does not signify whether the case was stated with a view to a litigation which takes place the next year, or 20 years afterwards. It has been decided that cases for the opinion of counsel, are not protected on the ground of their being confidential communications; and, if they are not protected on that ground, they are not protected at all.

With respect to those documents which are said to be in public offices, there can not be any ground for resisting their production. The defendants have not told us where the public offices are, in which they are deposited. If they have got papers in their possession, which are evidence against them, and material for our purpose, we are entitled to see them. There can be no doubt of the materiality of these papers, for they are, some of them, the ancient accounts kept by themselves, and by the crown, before their title accrued. We may find, if the production of these accounts is compelled, that there is as little ground for the claim by prescription, as for that by grant. If these payments are found not to have been from time immemorial, that fact would have great weight in deciding the question as to whether their title is good or not. They may relate to their title, but they do not deny that they are material to our case.

The Vice-Chancellor. In this case I understand there is no objection made to the production of the documents contained in the first

* Not yet reported.

schedule to the first answer, and in the first schedule to the further answer.

With respect to the documents contained in the second schedule to the same answer, the part of the answer which refers to the schedule is in these words: "the defendants admit that they have in their possession or power, various charters, books of account, &c. relating to the matters in the bill mentioned, (other than and besides such of the particulars aforesaid being in the possession or power of these defendants as are, or form, or contain any statements of the title under which these defendants claim the town dues or customs aforesaid, or as relate to any of the matters stated in the said bill, which are hereinbefore demurred to:) And these defendants have, in the second schedule to their answer annexed, set forth a list and description of the said charters, &c., other than as aforesaid;" which sentence I understand to be a representation that the defendants have, in the second schedule, set forth copies of the documents which do not relate to their title, or to that matter, from a discovery of which they wish to protect themselves by demurrer, but do relate to matters to which they admit the plaintiffs are entitled to a discovery; and, on that statement, (that being all) it appears to me that the plaintiffs are entitled to have an inspection of those documents. But, if there is any thing special with respect to the nature of those matters, a discovery of which the defendants have admitted they are bound to make, so as, upon the mere inspection of what these matters are, it would appear that the plaintiffs have no right to have the inspection, I must read over the first answer more particularly than I have had an opportunity of doing.

With respect to the papers contained in the first schedule to the second answer, it appears, upon the face of the answer, that the defendants are willing that the plaintiffs should have an inspection of them.

Then as to the cases stated by Brown and Statham, for the opinion of counsel. It appears, in the body of the answer, that those cases represented that the title of the defendants to the tolls which they claim, was by prescription. But it also appears, by the same answer, that the title of the defendants was not a title by prescription, but by grant. Those cases, therefore, contain a representation that the defendants have not that title which they allege they have, and will assist the plaintiffs in defending themselves against the claim made by the defendants; and, as there is no statement that those cases were prepared with reference to the action which caused this bill to be filed, I think that the plaintiffs are entitled to an inspection of them.

With respect to the other cases, it is alleged, in the body of the answer, and the dates of them which appear in the schedule, show that they were prepared in contemplation of, and with reference to the action in the bill mentioned, and with reference to this suit. Now the decision, which has been referred to, in the house of lords, does not appear to have had any relation to a case submitted to counsel with regard to the suit: and it is admitted that a party can not by means of a bill in this court, obtain from a defendant, a discovery of a communication which he has made to his counsel. There is no instance of a bill being filed suggesting that, at a consultation between a party and his counsel statements were made by the party which would defeat his claim, and praying for a discovery of those statements. The late Lord Chancel-

lor, when his attention was expressly called to the point, was of opinion that communications between a party and his solicitor in the progress of the cause, or with reference to the cause previous to its being instituted, ought not to be divulged; and it appears to me that there is no sound distinction between a communication made by a party to his solicitor, during the progress of the suit, or with reference to the suit immediately previous to its being instituted, and a statement made by the solicitor to counsel under the same circumstances. If a party ought not to be compelled to produce a letter written by himself to his solicitor stating the circumstances of his case, can it be said that, when those same circumstances are, by the direction of the party, stated in the shape of a case for the opinion of counsel, they shall be divulged? The decision in Hughes *v.* Biddulph establishes a principle which is directly applicable to all the cases in the possession of the corporation, other then those stated by Brown and Statham; and my opinion is, that they ought not to give an inspection of any of their cases except those which were prepared by Brown and Statham.

With respect to the documents contained in the third schedule, I understand that they are represented, generally to be documents which evidence the title of the defendants. In the body of the answer, the corporation state that they have, in their possession certain grants, deeds, documents and papers relating to the matters aforesaid, or some of them, but that many of such grants, deeds, and documents are title-deeds, evidencing and showing the title of the defendants to the town and lordship of Liverpool, and to the town dues and customs aforesaid, and that many of such documents and papers are copies of accounts from public offices. In the body of the answer, therefore, they have not, as I understand it, alleged that those copies of accounts from public offices evidence their title. But the schedule is part of the answer, and contains a preliminary description, which, in my mind, applies to all the portions of the schedule which follow it. That description is in these words: "List of copies of documents and papers from public offices evidencing the title of the defendants to the town and lordship of Liverpool, and the town dues and customs in question." Now, in the course of the reply, it was said, very truly, that, where there is a deed relating to the title of both parties, production of it will be ordered; but that, where a person claims as heir at law, the documents which constitute the title of the defendant, shall not be produced, because the plaintiff's title does not depend upon documentary evidence; and it appears to me that there is a very clear analogy between the case of an heir at law claiming an estate, and the case of the plaintiffs in this cause, who, *primâ facie*, have a right to be exempted from the payment of any toll; and it lies on those who insist on having a title to levy these tolls, to make out a title contrary to the force of the common law. But then the same principle also extends to exempt these defendants from manifesting their title which is to the prejudice of the *primâ facie* right of the plaintiffs to be exempted from the payment of toll. And, inasmuch as these documents are described as being documents which evidence the title of the defendants, and as nothing is to be inferred, from any passage in the answer, that they evidence the title of the plaintiffs, (which they might do, though they evidenced the title of the defendants) I am of opinion that, with re-

spect to all the documents contained in the third schedule, an inspection ought not to be granted*.

## Emerson *v.* Harland.

3 *Simons*, 490.

To a bill filed by persons claiming title to an estate as the co-heirs of A. *ex parte maternâ*, the defendants pleaded that another person was the heir of A. *ex parte maternâ*, but did not set forth the pedigree of that person: *semble* that such a plea is good.

May 4, 1830.

THE plaintiffs by their bill, claimed to be entitled to one undivided third part of certain estates in Yorkshire, as the co-heirs, *ex parte maternâ*, of one Ann Trigg, and prayed that it might be declared that they were so entitled; that accounts might be taken of the estates, and of the rents received by the defendants, since the decease of Ann Trigg, and that a partition of the estates might be made between the plaintiffs and the defendants. The defendants put in a plea in the following words: "That Lois, the wife of Timothy Morine of Wetherby in the county of York, gentleman, formerly Lois Harland, was at the death of Ann Trigg in the said bill named, and now his heir at law of the said Ann Trigg, *ex parte maternâ*, and of the whole blood which the defendants aver to be true and are ready to prove, &c."

Neither Lois Morine nor her husband were parties to the suit.

The Solicitor-General and Mr Swanston in support of the plea, said that the plea, as framed, tendered a sufficient issue, although it did not set forth the pedigree of Lois Morine: that this was an affirmative plea; and that it was improper that a plea should state evidence of the fact pleaded.

Mr Knight and Mr Spence in support of the bill said that it was incorrect to plead, generally, that a person was heir: that the pedigree of Mrs Morine ought to have been set forth: that heirship, was not a fact, but a conclusion of law: Gun *v.* Prior, 1 Cox, 197: Sanders *v.* King, Madd. & Geld. 61; Thring *v.* Edgar, 2 Sim. & Stu. 274; that the bill charged that the defendants had frequently, by correspondence and otherwise, admitted the plaintiffs' title, and that the plea ought to have been accompanied with an answer to that charge.

The Solicitor-General, in reply, said that the admission, by the defendants, of the plaintiffs' title, was a collateral fact: that the plaintiffs were put out of court by the defendants showing that the title to the estate was not in them, but in another person; that no admission by the defendants would give the plaintiffs a title: that, if the defendants had answered the charge in question, they would have overruled their plea.

* On the 13th February 1832, Lord Brougham, C., affirmed the Vice-Chancellor's order.

[Emerson *v.* Harland.]

THE VICE-CHANCELLOR. I think that the defendants should have supported their plea by an answer denying the correspondence: and, on the ground that they have not done so, I overrule the plea.

## Balm *v.* Balm.

3 *Simons*, 492.

Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable to them at 21, and those of the girls at 21 or marriage, and to accumulate for them in the mean time, with benefit of accruer and survivorship: and, in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid. Held that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained 21 or married, was entitled to a share of the testator's residuary estate.

June 15, 1830.

RICHARD BALM, by his will dated the 17th August 1815, gave the residue of his personal estate to his executors, upon trust, to invest the same in the funds, in their names, upon trust to pay, transfer, and make over, the said stocks, funds and securities, unto and equally between his great-nephews and nieces, the children of his nephew John Balm, and their respective executors, administrators, and assigns, the shares of the boys to be payable and transferable to them at their respective ages of twenty-one years, and those of the girls, at that age or day of marriage, which should first happen, and to accumulate for them, in the mean time, with the usual benefit of accruer and survivorship in case of the death of any or either of them under the age or time aforesaid: and, in case of the death of all the said children, except one, before their shares of the said residue became vested interests, then to pay, transfer and make over the whole of the said stocks, funds, and securities, with the dividends and accumulations thereof, unto such only surviving child, at the age or time aforesaid.

The testator died on the 30th of October 1815, at which time John Balm had issue two sons and three daughters, who were the plaintiffs in the cause. In October 1816, and whilst all those children were under age and unmarried, he had another son born, namely, the defendant, Thomas Sherwood William Balm.

The question was, whether T. S. W. Balm was entitled to participate, with his brothers and sisters, in the residuary personal estate of the testator Richard Balm, or whether his brothers and sisters were exclusively entitled thereto.

Mr Barber, for the plaintiffs, the children of John Balm, born in the lifetime of the testator.

Mr Rawlins, for the defendant T. S. W. Balm, cited Gilmore *v.* Severn, 1 Bro. C. C. 582.

[Balm *v.* Balm.]

The VICE-CHANCELLOR. The testator, here, has put a construction on the word "vested:" and, according to that construction there is no vesting until a boy attains twenty-one, or a girl marries. Declare that the personal estate of the testator, R. Balm, became and is divisible amongst the plaintiffs and the defendant T. S. W. Balm.

## Mary Ann Amelia Healey, and Georgiana Augusta Healey, plaintiffs; and James Jagger and Jane his wife, George Richards Healey and Robert Williams, defendants.

3 *Simons*, 494.

A plaintiff having, by mistake, omitted to file a replication before he examined his witnesses, leave was given to him, notwithstanding publication passed, to re-examine his witnesses on the interrogatories already filed, but not to examine any new witnesses.

June 9, 10, 1830.

THE plaintiffs had examined their witnesses in May and June 1828, and before they had filed a replication to the answers of the defendants. The defendants Jagger and his wife, wishing to cross-examine the plaintiffs' witnesses, moved, on the 4th of November 1828, that those witnesses might be produced, at the plaintiffs' expense, to be examined by the defendants, either on a commission or before one of the examiners, or that their depositions might be suppressed, "the said witnesses having been examined, by the plaintiffs, without having filed any replication:" and the court ordered the witnesses to be produced for cross-examination, according to the notice of motion. In March 1829 the plaintiffs replied to the answers; and Jagger and wife, in pursuance of the order, cross-examined the plaintiffs' witnesses, and examined other witnesses for themselves. Publication having passed, in August 1829, the cause came on to be heard, before the Master of the Rolls, in May 1830, when the defendant George Richards Healey objected to the reading of any of the plaintiffs' evidence, on the ground that it had been taken before his answer was replied to, and without his having been served with notice of the examination. The court ordered that the cause should stand over, in order that G. R. Healey might apply to have the depositions suppressed; and, on the 17th of May 1830, the court ordered that the depositions should be suppressed, and that the plaintiffs should pay to G. R. Healey the costs of the application.

A motion was now made, on behalf of the plaintiffs, that the last-mentioned order might be discharged or varied; and that the defendant G. R. Healey, might be at liberty to cross-examine the witnesses who had been examined on behalf of the plaintiffs, and that the plaintiffs might be at liberty to read, at the hearing of the cause, the depositions of those witnesses, or to re-examine them upon the interrogatories already filed. This motion was supported by an affidavit purporting that the solicitor for G. R. Healey was aware of the witnesses

having been examined on behalf of the plaintiffs, prior to the time when publication passed, and that he was aware of the order of the 4th of November 1828, and of the plaintiffs' witnesses having been cross-examined, by Jagger and wife: that he had seen the depositions taken on such examination and cross-examination: that Jagger and wife had not only cross-examined the plaintiffs' witnesses, but had examined witnesses in chief, as to the facts on which the legitimacy of the infant plaintiff (and which it was the interest of G. R. Healey to dispute) depended: that such cross-examination and examination in chief, were, in fact, made for the benefit of G. R. Healey; and that it was thought unnecessary to go into a separate cross-examination and examination in chief on his behalf: that the legitimacy of the infant plaintiff was fully established by the evidence in the cause; and that she was entitled to the decree of the court in her favour.

Mr Knight and Mr B. Parry, in support of the motion, said that G. R. Healey was the only one of the defendants who was materially interested in the suit: that he left his defence to Jagger and wife: that he must have known of the cross-examination and examination in chief that had taken place under the order of the 4th November, and that they ought to be considered as his acts. Cox *v.* Allingham, Jacob, 337.

Mr Pepys and Mr Garratt, for the defendant G. R. Healey, said that the omitting to file a replication before the witnesses were examined, could not have arisen from mistake, as every solicitor must know that it is irregular to examine witnesses before that proceeding has taken place, and as the application made, by Jagger and wife, in November 1828, must have brought the irregularity as to the other defendant, to the notice of the plaintiffs: that the court will not allow a party to re-examine his witnesses unless it appears that the mistake was unintentional: Marquis Cholmondeley *v.* Lord Clinton, 2 Mer. 71: that it was not probable that G. R. Healey, who had a most important interest at stake, and whose title depended upon the testimony of witnesses, should know that witnesses were to be examined, and yet take no part in the proceeding: that no one ever heard of witnesses being re-examined, when the party knew the contents of their depositions: that knowledge of the irregularity, in November 1828, had been brought home to the plaintiffs' solicitor, and that, from that time, there had been wilful default on their part; that, if the depositions were not suppressed, the court would allow depositions to be read, at the hearing, which were not evidence; for the examiner had no authority, before replication, to administer an oath: that the witnesses could not be indicted for perjury, on the depositions, as the indictment must state that the replication and all the other proceedings in the cause, had regularly taken place.

*June* 10.—The Vice Chancellor. It appears to me that the irregularity in this case, has happened by mistake: and I think it right to give the plaintiffs an opportunity to re-examine their witnesses.

"Order that the publication in this cause be enlarged until the first day of Michaelmas term next: that the plaintiffs be at liberty to re-examine, upon their interrogatories already filed, their witnesses whose

depositions have been suppressed under the order of the 17th of May 1830; and the defendants are to be at liberty to cross-examine those witnesses, but the plaintiffs are not to examine any new witnesses; and the defendant G. R. Healey is to be at liberty to examine any witnesses he may be advised, and the plaintiffs are to be at liberty to cross-examine them, and are to pay to G. R. Healey the costs of this application.

The defendants, Jagger and wife, were not parties to the order of the 17th of May, nor to that of the 10th of June, nor had they any notice of the plaintiffs' intention to apply for it; and the plaintiffs proceeded to examine their witnesses, under the last-mentioned order, without serving any notices on Jagger and wife.

When the cause again came on to be heard, the last-named defendants objected to the evidence for the plaintiffs being read against them, as the only depositions to which they were parties, had been suppressed, generally, by the order of May 1830. The Master of the Rolls allowed the objection, and adjourned the cause, in order that the plaintiffs might apply to the court to have the last-mentioned order varied, by making it suppress the depositions as against G. R. Healey only: and, on the 8th of July 1831, that order was varied accordingly.

## Clarke *v.* Royle.*

3 *Simons*, 499.

A. conveys an estate to B., in consideration of B. entering into the covenants contained in the deed, for paying an annuity to A., and 3,000*l.* to certain persons in the event of his, B.'s, marrying. Held that the covenants did not create a lien on the estate.

February 1, 1830.

BY indentures of lease and release of the 21st and 22d of January 1818, the release reciting that George Hankinson had agreed to convey, to Charles Hankinson the hereditaments therein described, in consideration of Charles Hankinson entering into the covenants therein contained, for payment to George Hankinson, during his life, of an annuity of 60*l.*, and also in consideration of Charles Hankinson entering into the other covenant thereinafter contained: It was witnessed that, in pursuance of the said agreement, and in consideration of the covenants of the said Charles Hankinson, to the effect in the said indenture contained, George Hankinson conveyed the hereditaments to Charles Hankinson in fee. And it was further witnessed that, in pursuance of the agreement on the part of Charles Hankinson for entering into such covenants as aforesaid, he, the said Charles Hankinson did, for himself, his heirs, executors and administrators, covenant with George Hankinson, his heirs and assigns, that he the said Charles Hankinson, his heirs, executors, administrators and assigns, would pay, to George Hankin-

* The report of this case has been deferred in the hope that a brief in the cause might be obtained. The above statement of the case was extracted from Reg. Lib.

son, an annuity of 60*l.* for his life, the first payment to be made on the 25th of March then next: and Charles Hankinson, for himself, his heirs, executors and administrators further covenanted with George Hankinson, his heirs and assigns that, in case Charles Hankinson should happen to marry, he, his heirs, executors, administrators or assigns would, within 12 calendar months afterwards, pay, in such proportions and in such manner as George Hankinson should think proper, the sum of 3,000*l.* unto James Hankinson, Sam. Hankinson, Aaron Hankinson, and the children of Mary Islam, and certain other persons.

Under these deeds Charles Hankinson entered into possession of the estates conveyed to him, and regularly paid the annuity of 60*l.* to George Hankinson down to the 3d of June 1827, when George Hankinson died. In March 1826, Charles Hankinson became a bankrupt, and the plaintiff was chosen his assignee. In November 1826, the bankrupt's estates were sold by auction, and lot 1 was purchased by the defendant. He refused to complete his purchase on the ground that the covenant in the indenture of the 22d of January 1818, for payment of the 3,000*l.*, in the event therein mentioned, was not merely a personal covenant of Charles Hankinson, but was a lien, by way of charge, on the purchased premises, and, consequently, that the title was, on that account, defective.

The present suit was instituted to compel a specific performance of the agreement for the purchase.

Mr Lovat for the plaintiff:

It could not be the intention of the parties to the deeds of January 1818, that the purchaser should not have the complete dominion over the estate, until the death of the seller. With respect to the covenant to pay the 3,000*l.*, the contract was not a contract to sell for 3,000*l.*, but for a covenant to pay 3,000*l.*, in an event that might or might not happen. Could it be intended that Charles Hankinson should not have the dominion over the estate until his death; for, until that event, it was uncertain whether the 3,000*l.* would or would not become payable. Besides, this was a covenant to pay, the 3,000*l.* to third persons, and not to the covenantee. How could a lien be created on behalf of third persons? The case of Tardiffe *v.* Scrughan, 1 Bro. C. C. 423, cited, will be cited for the purchaser. But that case was disapproved of, by Lord Eldon, in his judgment in Mackreth *v.* Symmons, 15 Ves. 352: Winter *v.* Lord Anson, 1 Sim. & Stu. 434, is directly in point.

Mr Phillimore for the defendant:

There was no consideration paid for the conveyance of January 1818; but the consideration was the grant of the annuity, and the covenant to pay 3,000*l.* This affords a strong presumption that the parties intended that there should be a lien on the estate, both for the annuity, and the sum in gross. It appears, from the witnessing part of the release, that the consideration has been satisfied in part only, and that it will not be wholly satisfied until the sum of 3,000*l.* is paid.

[The Vice-Chancellor:—Can you cite any case where the consideration for a purchase has been an annuity and a sum payable on a contingency, for both of which securities are given, and it has been held that the vendor had a lien on the land for the annuity and sum of money?]

[Clarke *v.* Royle.]

The case of Tardiffe *v.* Scrughan is a very important decision with reference to the present question.

The Vice-Chancellor. It appears to me that Lord Eldon, in Macreth *v.* Symmons, expressly over-ruled the decision in Tardiffe *v.* Scrughan. Besides, the case now before me is not similar to Tardiffe *v.* Scrughan; for, in that case there was simply a bond given for the annuity. But here the parties expressly recite that George Hankinson had agreed to convey, the estates, to Charles Hankinson, in consideration of his entering into the covenant for payment of the annuity, and in consideration of his entering into the other covenant thereinafter contained. So that the release states, distinctly, the two circumstances that form the consideration: and then it is witnessed that, in consideration of the covenants, of Charles Hankinson, in the indenture contained, George Hankinson conveys the premises to him. And then it is further witnessed that, in pursuance of the agreement, on the part of Charles Hankinson, for entering into such covenants as aforesaid, &c. So that the deed plainly marks out that the consideration, on the one side, was the conveyance of the estate, and, on the other, the entering into the covenants. Then why am I to declare that, in respect of this annuity, and of the sum which is payable on a contingency, and which, therefore, never may be payable, there is to be a lien on the purchased estates? Why should I go farther than any of the cases that have been hitherto decided upon the subject of lien on purchased estates, and do that which appears to be contrary to the intention of the parties? I consider that this case is decided by the authority of Winter *v.* Lord Anson.

This court doth declare that the sum of 3,000*l.* by the covenant in the indentures of lease and release, in the pleadings mentioned, agreed to be paid, by Charles Hankinson, in case he should happen to marry, to and among the persons therein named, is not a charge or lien on the lands and hereditaments comprised in the agreement in the pleadings mentioned: and this court doth order and decree that the said agreement be specifically performed and carried into execution, &c."

## Platt *v.* Platt.

3 *Simons*, 503.

Testator bequeathed 10,000*l.* to trustees, in trust to pay the interest to his daughter, for life. Provided that, when she married, one moiety of the 10,000*l.* should be paid to her or her husband, and that the other moiety should be held in trust to pay the interest, to his daughter, for life, and, after her decease, in trust for her children, and, if she had no children, then to sink into the residue of his personal estate, which he gave to his two sons. The daughter married during the testator's lifetime, and the testator settled 10,000*l.* in trust for his daughter for life, for her separate use, and, after her decease, in trust for her husband for life, and, after the decease of the survivor, in trust for the children of the marriage as the husband and wife should jointly appoint; and, in default of such joint appointment, then as the survivor should appoint; and, in default of any appointment, then in trust for the issue of the marriage; and, on failure of

[Platt *v.* Platt.]

such issue, then in trust for the issue of the testator living at the death of the survivor of the husband and wife: Held that the provision made by the settlement was a satisfaction of the legacy.

May 22, and June 22, 1830.

THOMAS PLATT, Esq. by his will dated the 21st of February 1826, bequeathed, to trustees, two sums of 10,000*l.*, and 10,000*l.* in trust, to invest the same separately in their names in the public funds, and to stand possessed of one of the said sums of 10,000*l.*, and the funds and securities whereupon the same should be invested, in trust, during the life of his daughter, Mary Platt, or until she should be married, to pay the dividends, interest, and annual produce thereof unto his said daughter, for her own absolute use and benefit, and to stand possessed of the other of the said sums of 10,000*l.*, and the funds and securities whereupon the same should be invested, in trust, during the life of his daughter, Sarah Platt, or until she should be married, to pay the dividends, interest, and annual produce thereof unto her, for her own absolute use and benefit. Provided always, and it was his will that, when and so soon as either of his said daughters should marry, then one moiety of the said principal sum of 10,000*l.*, securities and funds, to the dividends, interest, and annual proceeds whereof each such daughter should have been previously entitled, should belong to, and be paid and transferred to her or her husband; and the other moiety should be held by his trustees, in trust to pay the dividends, interest and annual proceeds thereof to such daughter, for her life, (but not for her sole or separate use, so as to exclude her husband;) and, after her decease, upon trust to pay, transfer and divide such moiety to and amongst the child or children of such daughter, in equal shares and proportions, if more than one, the same to vest, in such child or children, at her or their respective ages of 21 years, with survivorship between them in case of death under that age, and with power to apply the dividends, interest and annual produce thereof in or towards the maintenance and education of such child or children, according to their presumptive shares in the principal; and, if there should be no such child, or none who should attain the said age, then he directed that such moiety, with all the accumulations from the dividends, interest and annual proceeds thereof, should sink into, and be considered as part of his residuary personal estate, and so, in like manner, upon the marriage of any other of his said daughters as to the 10,000*l.*, funds or securities, to the dividends, interest, or annual proceeds whereof she should have been previously entitled. Provided that, in case his said daughters, or either of them, should depart this life without having been married, then the sum of 10,000*l.* bequeathed for the benefit of such daughter so dying unmarried, and the funds whereupon the same should be invested, and all accumulations in respect thereof, should sink into and be disposed of as part of his residuary personal estate, and so and in like manner upon the decease (without having been married) of any other of his daughters. And the testator gave the residue of his real and personal estate and effects to the same trustees, in trust to pay, transfer, convey, assign or otherwise assure the same and every part thereof, unto his two sons, the defendants, Thomas Pell Platt and George Platt, equally to be divided between them, as tenants in com-

mon, and not as joint-tenants, their respective heirs, executors, administrators and assigns, in case they should both survive him, but, in case either of them should die in his lifetime, without leaving issue living at the testator's decease, or born in due time afterwards, then upon certain other trusts in the will mentioned, which failed of taking effect by the death of the testator in the lifetime of his two sons, Thomas Pell Platt and George Platt.

In May 1828, Mary Platt, one of the daughters of the testator, intermarried with William Stone; and, in contemplation of such marriage, the testator, by his bond, bearing date the 21st of May 1828, became bound, to certain persons, in the penal sum of 20,000*l.*, with a condition to be void on payment, by the executors or administrators of the testator, to the obligees, of the sum of the sum of 10,000*l.*, within 12 calendar months next after the decease of the testator, or otherwise, in the event of the intended marriage not taking place. And, by an indenture of settlement, of even date with the bond, and made between the testator and Mary Platt, his daughter, of the first part, William Stone of the second part, and the obligees of the third part, after reciting the intended marriage, it was declared that the obligees should stand possessed of the bond, and of the 10,000*l.* secured thereby, upon trust to recover and receive the 10,000*l.* and to lay out and invest the same, upon government securities, and to stand possessed of the same funds and securities and the principal monies thereupon invested, upon trust, from time to time, during the life of Mary Stone, to pay and apply the dividends, interest, and annual proceeds of the said securities and principal monies, unto such person or persons, and in such manner, and for such purposes, as she, from time to time, during her life, notwithstanding her coverture, (but not by way of assignment, charge, or other anticipation thereof,) should by any writing under her hand, from time to time, appoint: and, in default of such appointment, upon trust, to pay the same into the proper hands of Mary Stone, for her separate use; and upon further trust, after the decease of Mary Stone, from time to time, during the life of William Stone, (if then living,) to pay unto him, or his assigns, the dividends, interest and annual proceeds of the said funds, securities, and principal moneys; and, after the decease of the survivor of Wm. Stone and Mary Stone, upon trust, to pay and transfer the same trust funds, securities, and principal monies, unto, between, or amongst all and every, or any one or more such children, or any only child, of William Stone and Mary Stone, and such children or child of any then deceased child or children, and all and every, or any such one or more of such children, and other issue as aforesaid, in such shares and proportions, manner and form, for such interest or interests, and subject to and with such powers, provisoes, conditions, restrictions and limitations over, being for the benefit of some or one of such children, or such issue of a then deceased child or children, and with such directions for maintenance, education or advancement, and with or without power of revocation and new appointment, as William Stone and Mary Stone, at any time or times, by any deed or deeds, writing or writings, to be by them sealed and delivered in the presence of two or more credible witnesses, should jointly appoint; and, in default of such appointment, then as the survivor of them the said William Stone and Mary Stone, at any time or times, by any will or testamentary writing, to be by him

or her surviving, signed in the presence of and attested by, two or more credible witnesses, should appoint; and, in default of such joint or separate appointment, in trust to pay or transfer, the said trust funds, and principal moneys unto, between, or amongst all and every the child or children of the said William Stone and Mary Stone, equally to be divided between or amongst them, if more than one, share and share alike, for their portions; and, if there should be but one such child, then the whole to such one child, for his or her portion, and that the same or the shares thereof should be transferred or assigned to such child or children in the manner following; that is to say, the portion, part or share, portions, parts or shares, of such of them as should be a daughter or daughters, should be paid and transferred, to her or them respectively, at her or their age or respective ages of 21 years, or day or respective days of marriage which should first happen, and the portion, part or share, portions, parts or shares, of such of them as should be a son or sons, should be paid and transferred to him or them respectively, at his or their age or respective ages of 21 years, unless such time or times respectively should happen in the lifetime of William Stone and Mary Stone, or the survivor of them; and in that case it was directed that such portion or share, portions or shares, should be vested and transferable, but should not be assigned until after the death of the survivor of them the said William Stone and Mary Stone. And the settlement contained clauses of survivorship, and accruer, and hotchpot, and for the maintenance, education and advancement of the child and children of the marriage by and out of the dividends and interest of the said trust funds, and for the advancement of any son or sons out of the principal trust funds, and for the accumulation of the residue of the dividends and interest thereof. And it was thereby declared that, in case there should not be any child or children of the marriage, or being such, if all and every such daughter or daughters should depart this life, under the age of 21 years, without having been married, and all and every such son or sons should depart this life under the age of 21 years, then that the trustees should stand possessed of the trust funds, or so much thereof as should not be appointed as aforesaid, upon trust, after the decease of the survivor of William Stone and Mary Stone, and such want or failure of issue as aforesaid, to transfer and pay, the said trust funds, unto all and every the child and children of the testator, then born or thereafter to be born, who should be living at the decease of the survivor of Mary Stone and William Stone, and such want or failure of issue as aforesaid, and the issue then living of such of them as should have died in the lifetime of Mary Stone, and Willlam Stone, or the survivor of them, or of the issue of the marriage, if any, to be divided amongst them, if more than one, *per stirpes*, and not *per capita*. And it was thereby provided that, in case any son or sons of William Stone by Mary Stone should depart this life under the age of 21 years, leaving issue living at the time of his or their death, then the issue of each such son so dying, in equal proportions, if more than one, should be entitled to his or their father's share.

The testator died in February 1829.

The bill was filed by Jane Platt, the widow and executrix of the testator, against Thomas Pell Platt and George Platt, the sons and executors

of the testator, and against Mr and Mrs Stone, and their infant child; and also against the persons who were the obligees in the bond, and trustees of the settlement executed on the marriage of Mr and Mrs Stone. The question in the cause was, whether Mr and Mrs Stone were entitled to claim the 10,000*l.* under the will and also the sum, to the same amount, secured by the bond and settlement, or whether the latter was a satisfaction of the former.

The Solicitor-General and Mr. Sidebottom, for the defendants, Thomas Pell Platt and George Platt:

Although there is a material difference between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other. The sum given by the will is a marriage portion, and so is the provision made by the settlement. The modification is quite immaterial. Trimmer *v.* Bayne, 7 Ves. 508.

Mr Pepys and Mr Wilbraham, for the defendants, Mr and Mrs Stone:

By the will, the children of Mr and Mrs Stone would take 5,000*l.* only; by the settlement, the whole 10,000*l.* is settled on them. The wife has, by the settlement, the whole of the income for her separate use: by the will, she has the income of a moiety only, and that not for her separate use. The provisions and the interests of the parties under the two instruments, are totally different. The dispositions made by the will and by the settlement, in the event of there being no children who are entitled to take, are also totally different from each other; and the residuary legatees ought not to be deprived of their interests under the will. The testator has permitted the gift by the will to remain until his death. This is not a case of satisfaction, nor is it a case of election, which must arise upon the will itself. Haynes *v.* Mico, 1 Bro. C. C. 129, Baugh *v.* Read, 1 Ves. jun. 257; S. C. 3 Bro. C. C. 192, Bell *v.* Coleman, 5 Madd. 22.

The Solicitor-General, in reply.

Lord Eldon, in his judgment in Trimmer *v.* Bayne, says: "But the rule is settled that where a parent, or a person *in loco parentis*, gives a legacy as a portion," &c*. And his lordship afterwards says: "In ordinary cases without examining whether it would be satisfactory," &c*. In that case too the whole sum was differently disposed of by the will, from what it was by the settlement. Sir W. Grant drew the distinction in Hartopp *v.* Hartopp, 17 Ves. 184. See 189. His Honor there says: "It is settled that, in the case of double provisions by a father for a child slight circumstances of difference are not to be regarded; at least, where the question is not, whether a bounty is meant to satisfy a debt, but whether one bounty is to be substituted in the place of another." In every case in which the question of satisfaction has arisen, the will must have been permitted to remain unaltered, for otherwise the question can not arise. The case of Bell *v.* Coleman has nothing to do with the present case. As to the disposition in favour of the residuary legatees, it is an incident only to the gift: for they

* See 7 Ves. 515, 516.

are not the objects of the gift. The sole question is, whether both the provisions are, or are not, marriage portions.

*June* 22.—The VICE-CHANCELLOR. The bill is filed by Jane Platt, who was one of the executors of the testator, against William Stone and Mary his wife, and the residuary legatees: and the question between the residuary legatees and the defendants Stone and his wife, is, whether they are entitled both to the legacy, and also, to the sum secured by the bond.

Now it is a settled rule of this court, where a legacy is given to a child in such a form as to show that it was intended as a portion, and there is a subsequent advance, by the father to the child, in the nature of a portion, that the subsequent advance should be an ademption of the legacy. The court is not in the habit of attending to small circumstances, so as to be induced to break into the rule. That has been decided in the case of Hartop *v.* Whitmore, 1 P. W. 681, where, (according to the facts of the case, as they appear, not by the report, but by the statement, in the note, from the registrar's book), there was a legacy of 300*l.* given, and a payment made by the father of 200*l.*, and it was held that that payment should be considered as an ademption of the legacy.

Lord Eldon, in reasoning on the case of *Ex parte Pye*, 18 Ves. 140, goes so far as to say that, if a legacy had been given of 10,000*l.* by the will, an advance and settlement afterwards made of 5,000*l.*, it might be considered as an ademption of the legacy. I mention that, because it does appear, in this case, that the sum which the child is to take, by virtue of the settlement, is not, in the event of failure of the issue of the marriage, to go in the same way as it would have gone according to the disposition of the will. There is some difference in that respect; but I apprehend that it is not a material difference, certainly not so material as between 200*l.* and 300*l.*, or 10,000*l.* and 5,000*l.*

According to the reasoning of Lord Hardwicke, in the case of Alleyn *v.* Alleyn, 2 Vez. 37, it would appear that, if the fund was given to the child, for life only, that should not be considered as an ademption of the legacy given to the child by the will. I take it that that doctrine is not applicable to cases where, though the interest of the fund is given to the child for life only; yet it happens to be a part of the case that the fund itself is settled in such a way as that the interest is given to the intended husband for his life, with remainder to the children, in such a form that, if the children should attain 21, they would become absolutely entitled to the fund.

My opinion is that I am bound to say, looking at the several cases that have been decided upon the point, that the bond and the settlement must be taken as a satisfaction of the legacy, and that the parties are not entitled to receive the legacy.

## Bray *v.* Hammersley.

3 *Simons*, 513.

By a marriage settlement, a fund was vested in trustees, in trust for all and every the child and children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions and limitations as the wife, in case she survived her husband, should appoint. There was one child only of the marriage. The wife appointed the fund to that child, for her separate use, for life, and, after her decease, to such persons as the child should appoint, and, in default of such appointment, to the executors or administrators of the child. Held that the power in the settlement was well exercised.

May 24, 1830.

BY an indenture of the 25th of November 1805, and made between Broad Malkin, Esq. of the first part; Elizabeth Spode, spinster, of the second part; Josiah Spode, her father, of the third part; and William Spode and Josiah Spode the younger of the fourth part; being the settlement made previous to the marriage between Broad Malkin and Elizabeth Spode, the sum of 8,000*l.*, which was secured by the bond of Josiah Spode the father, was assigned, to William Spode and Josiah Spode the younger, in trust for Elizabeth Spode, for her life, for her separate use, and, after her decease, in case Broad Malkin should survive her, in trust for Broad Malkin for his life, and, after the decease of the survivor, in trust for all and every the child and children of the said Elizabeth Spode by Broad Milkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship, or otherwise, or subject to, with and under such conditions, restrictions and limitations over, the same to be always for the benefit of some one or more of such child or children as Broad Malkin and Elizabeth Spode, at any time or times, by any deed or deeds, writing or writings, with or without power of revocation, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, should jointly appoint; and, for want or in default of such joint appointment, and in case Elizabeth Spode should survive Broad Malkin, but not otherwise, then in trust for all and every the child and children of Elizabeth Spode by Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship, or otherwise, and subject to, with and under such conditions, restrictions and limitations over, the same to be always for the benefit of some one or more of such child or children, as Elizabeth Spode, alone, at any time or times, by any deed or deeds, writing or writings, either with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should appoint; and for want, or in default of such joint appointment by the

said Broad Malkin and Elizabeth Spode as aforesaid, and in case Elizabeth Spode should die, in the lifetime of Broad Malkin, leaving him surviving, whereby the sole appointment would not take effect as aforesaid, or for want of, or in default of such direction or appointment by Elizabeth Spode so given and reserved to her in the event of her surviving Broad Malkin, in trust for all and every the child and children of Elizabeth Spode and Broad Malkin, equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such only child, for his, her or their portion and portions, the part or share, parts or shares, of such of them as should be a son or sons, to be paid at his or their age or respective ages of 21 years; and the part or share, parts or shares, of such of them as should be a daughter or daughters, to be paid at her or their age or respective ages of 21 years, or day or respective days of marriage, which should first happen.

Broad Malkin died in 1806, without having joined with his wife in making any appointment of the 8,000*l.* and leaving Saba Eliza Bray, the plaintiff's wife, the only issue of the marriage, him surviving.

On the 11th of April 1827, Elizabeth Malkin executed a deed-poll, in the presence of and attested by two credible witnesses, whereby, after reciting the bond, and the settlement of the 25th of November 1805, and also reciting the death of Broad Malkin, and that Saba Eliza Bray was the only child of the marriage, and that there never was any other child, and that Elizabeth Malkin was then desirous of exercising the power of appointment given to her, by the settlement, in the event which had happened of her surviving her husband; it was witnessed that Elizabeth Malkin, in exercise of that power, did appoint that the defendant William Hammersley, formerly William Spode, and Josiah Spode the younger, should stand possessed and interested of and in the 8,000*l.* secured by the bond, (subject only to defendant Elizabeth Malkin's life interest therein), upon trust, immediately after her decease, to pay, assign and transfer the said trust moneys and securities, unto such person or persons, for such interest or interests, and in such parts, shares and proportions upon such trusts, and to and for such ends, intents and purposes, and with, under and subject to such provisions and restrictions, or otherwise in such manner and form as Saba Eliza Bray, at any time or times, and from time to time during the life of Elizabeth Malkin, or after her decease, and notwithstanding her then present or any future coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto. or other writing purporting to be, or in the nature of her last will and testament, to be by her signed and published in the presence of two or more credible witnesses, should appoint, and, in default of such appointment, then, as to such part or parts, if any, of the said trust moneys and securities, or the interest and yearly income thereof whereunto such appointment should not extend, or as to which the same should be partial or incomplete, but subject, and without prejudice thereto, upon trust, during the life of Saba Eliza Bray, to apply the income of the said trust moneys for her separate use, and, from and after the decease of Saba Eliza Bray to pay, transfer and assign the

said trust moneys and securities, or such unappointed part or parts thereof as aforesaid, unto the executors or administrators of Saba Eliza Bray, as part of her personal estate.

Saba Eliza Bray, by her will, signed and published in the presence of and attested by two credible witnesses, and bearing date the 3d of January 1828, after reciting the bond and settlement, and the death of Broad Malkin, and that she was the only child of Broad Malkin and Elizabeth his wife, and also reciting the deed-poll of the 11th of April 1827, did, in the exercise of the power to her given by the deed-poll, direct that the defendant William Hammersley and Josiah Spode the younger should stand possessed of the 8,000*l.* from and after the decease of Elizabeth Malkin, in trust for the absolute benefit of the defendant William Hammersley, formerly William Spode, his executors and administrators.

Saba Eliza Bray died on the 16th of May 1828.

The bill was filed by her husband, insisting that Saba Eliza Bray had no power to dispose of the 8,000*l.*, by her will, but that, upon her death, it became vested in the plaintiff, as her legal personal representative. It charged that no valid appointment of the 8,000*l.* under the power contained in the settlement of the 25th of November 1805, had ever been made, and that, if any such instrument as the alleged deed-poll of April 1827, was really made, yet, inasmuch as Saba Eliza Bray was the only child of the marriage of Broad Malkin and Elizabeth Malkin, and there never was any other child of the marriage, that the defendant, Elizabeth Malkin was not authorized, by the trusts and powers in the settlement of the 25th of November 1805, to make any appointment of the 8,000*l.*, or to appoint the same so as to give it to Saba Eliza Bray for her sole and separate use, or to give to her a power of appointing the 8,000*l.* by will.

The bill prayed that it might be declared that the plaintiff was entitled, under the circumstances aforesaid, to the 8,000*l.* upon the death of the defendant Elizabeth Malkin, and that that sum might be secured.

Mr Preston and Mr W. Russell, for the plaintiff, argued, 1st, that the power given, to Mrs Malkin, by the settlement of 1805, was a power of distribution only, and that, as Mr and Mrs Malkin had one child only, the power had become incapable of execution. Campbell *v.* Sandys, 1 Scho. & Lef. 281; 2d, that the power did not authorize Mrs Malkin to give a power of appointment, because *delegatus non potest delegare*.

The Solicitor-General and Mr J. Wilson appeared for the defendants; but

The Vice-Chancellor, without hearing them, said that the words by which the power in this case was given, were more extensive than the words by which the power was given in Campbell *v.* Sandys; that he did not see any reason why the power should not be executed in the manner in which it had been exercised by Mrs Malkin; that an only child was as much comprehended under the words of the power as if there had been more children than one, except for the purpose of distribution: that the power was capable of being exercised as to the time,

and as to the conditions, restrictions and limitations; and he could not say that the appointment made by Mrs Malkin was a bad exercise of the power.

Bill dismissed.

## Codrington v. Codrington.

3 *Simons*, 519.

The original bill sought to set aside an appointment on the ground of fraud. The plaintiff then amended his bill, and inquired as to the mode in which the appointment was executed and attested. Held that the plaintiff's case being one of legal validity and equitable invalidity, the inquiries were irrelevant, and therefore need not be answered.

June 16, 1830.

IN 1763, Sir William Codrington, being tenant for life of estates in Gloucestershire, with remainder to William Codrington, Esq., his eldest son in tail, joined with his son in conveying the estates, to John Buxton, in order to make him tenant to the *præcipe*, for the purpose of suffering a recovery, which it was declared should enure to the use of such persons and for such estates as Sir Wm. Codrington and his son should, during their joint lives, by any deed or deeds, under both their hands and seals, to be executed and attested by two or more credible witnesses, appoint; and, in default of such appointment, to the use of Sir Wm. Codrington, for life, with remainder to his son in tail male, with remainder to Sir Wm. Codrington in fee. The recovery was suffered in Easter term, 3 Geo. 3. By indentures of the 19th and 20th of May 1776, Sir Wm. Codrington and his son, for certain valuable considerations, moving from the former to the latter, and in the exercise of the power reserved to them as before mentioned, appointed and conveyed the estates to Sir Wm. Codrington in fee. In 1792 Sir Wm. Codrington died, having devised his estates to his nephew, the defendant Sir C. B. Codrington, for life, with remainders to his first and other sons in tail male. In 1816 Wm. Codrington, who on his father's death became Sir Wm. Codrington, died.

In 1828 the bill in this cause was filed, by a person calling himself Sir Wm. Raimond Codrington, and alleging that he was the only son of Sir Wm. Codrington, the son, against Sir C. B. Codrington, and his eldest son, praying that the appointment and conveyance of May 1776 might be declared to have been obtained by Sir W. Codrington, the father, from his son, by fraud, and for an inadequate consideration, and might be set aside *in equity*, and that the plaintiff might be declared to be entitled to an estate tail, in possession, in the estates, under the conveyance and recovery of 1763, and that Sir C. B. Codrington (who had been in possession of the estates ever since the decease of Sir Wm. Codrington, the father,) might account, to the plaintiff, for the rents.

Sir C. B. Codrington, in his answer, denied all the allegations of fraud and inadequacy of consideration contained in the bill, and added that the plaintiff was not the person he stated himself to be, and was not born in lawful wedlock, but was illegitimate.

[Codrington *v.* Codrington.]

The plaintiff then amended his bill, by introducing certain allegations, on which the following interrogatories were founded: "Whether the said indentures of the 19th and 20th days of May 1776 are, or do not purport to be, under the hands and seals of Sir Wm. Codrington the father, and Sir Wm. Codrington the son, in the said amended bill named, or how otherwise: and whether their execution of the said indentures respectively is not attested by two, or some and what number of credible witnesses, or how otherwise: and whether the said attestations do not severally express the facts of the said indentures being signed, sealed and delivered, by the said Sir Wm. Codrington the father, and Sir Wm. Codrington the son, in the presence of the attesting witnesses, or how otherwise: and that the said Sir C. B. Codrington may set forth, in words at length, the form in which the execution of the said indentures of the 19th and 20th days of May 1776, by the said Sir Wm. Codrington the father, and Sir Wm. Codrington the son, are attested."

Sir C. B. Codrington, by his answer to the amended bill, submitted and insisted that, regard being had to the several matters and things specified and set forth in his answer to the original bill, and to the fact that the indentures of May 1776 formed part of his title, and not of the plaintiff's pretended title, and that the attestation and execution of those indentures formed part of such indentures, the plaintiff had no right whatever to inquire of him, and he was not bound to answer, and, therefore, refused to answer, unless compelled by the order of the court, the interrogatories before set forth.

The plaintiff excepted to the answer, on account of such refusal, and the exceptions were allowed by the Master. The plaintiff then excepted to the Master's report, and that exception now came on to be argued.

Mr Knight and Mr T. H. Hall, in support of the exceptions, said that this was the case of a deed sought to be set aside, and not of an instrument which formed part of the defendant's title, Beckford *v.* Wildman, 16 Ves. 438; Ovey *v.* Leighton, 2 Sim. & Stu. 234.

The Solicitor-General, Mr Pepys and Mr Ellison, in support of the Master's report:

It is settled that the defendant may, by answer, protect himself from answering, where the matter is criminatory, or would defeat his title. A plaintiff has no right to the production of a defendant's defence, before the hearing. A plaintiff claiming as tenant in tail, has a right to the production of the deeds creating the entail, but not of those that were executed for the purpose of barring the entail. Battison *v.* Farrington, 2 P. W. 179, note; Lady Shaftesbury *v.* Arrowsmith, 4 Ves. 66. The best evidence that the plaintiff could have of the mode in which the deeds of May 1776 were executed and attested, would be by a production of those deeds; but, if he were to apply to have them produced, the court would refuse it. How then can he obtain indirectly, what the court would refuse if applied for directly? Vansittart *v.* Barber, 9 Price, 641. These deeds are not part of the plaintiff's case, and he has no right to have that set out which would damage the defendant. The case which the plaintiff makes, depends upon the legal validity of the deeds, and his right to have equitable relief. The object of the

amendments was to show that the deed had no legal validity. This was an abandonment of the original case, which rests upon fraud. The plaintiff's object, in amending his bill, was to establish a case of legal invalidity, which he could not have put upon the record; for then the defendant might have demurred. The interrogatories are wholly irrelevant; and the 74th of the New Orders authorizes the Master, in deciding on the sufficiency or insufficiency of an answer, to take into consideration the relevancy or irrelevancy of an interrogatory. The prayer of the bill is not adapted to the case attempted to be made; for there is nothing on the record which authorized the introduction of new facts; the case, as stated on the record, being one of legal validity and equitable invalidity.

Mr Knight, in reply:

A defendant has no right to decide, for himself, whether an interrogatory is or is not relevant. Is it not material for a plaintiff, who is impeaching a deed for fraud, to know the names of the witnesses,* in order that he may examine them, and ascertain, from the persons who were present at the transaction, all the details of it? Sir C. B. Codrington nowhere states that the power was legally executed; and, therefore, the plaintiff has a right to know whether he is to be met by a legal or an equitable defence. He has a right to know whether he is to go on at law or in equity; otherwise it may turn out, at the hearing, that he has incurred expense to no purpose. The deed being at issue, every thing relating to it is at issue, and a defendant has no right to withhold, from a plaintiff, that information which will enable him to judge in what court he is to sue.

The Vice-Chancellor. The question is, whether the statements, in the amended bill, as to the execution and attestation of the appointment of May 1776, are material to the plaintiff's case. It is clear, on the face of the bill, that the plaintiff has framed his case, and asked relief on the ground that the appointment is valid at law, but invalid in equity. He affirms that the deeds, by which the appointment was made, are valid at law, and states a case of equitable invalidity. He avers, expressly, that the indentures of May 1776 are, or purport to be, under the hands and seals of Sir Wm. Codrington, the father, and Sir Wm. Codrington the son, and that their execution of those indentures respectively, is attested by two credible witnesses, and that the said attestations severally express the fact of the said indentures being signed, sealed and delivered, by Sir Wm. Codrington the father, and Sir Wm. Codrington the son, in the presence of the attesting witnesses, and it does not appear that the answer of the defendant to those facts, either way, would affect the plaintiff's case. The only effect of giving an answer might be to show that the deeds were not good at law; but, as the plaintiff puts his case on the ground that he has not got the legal title, any answer that the defendant could give to these interrogatories would be entirely immaterial to the facts put in issue; and I, therefore, think that the exception to the Master's report ought to be overruled.

Exception overruled.

* The interrogatories did not ask who the witnesses were.

## Judd *v.* Judd.

3 *Simons*, 525.

Testator bequeathed his residuary estate to trustees, in trust to pay the income of one third part to his daughter Sarah, for life, and, upon her death, to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining 25; but in case his daughter should leave but one child her surviving, then the whole of the one third part to go to such only child, on his attaining 25, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain 25, then over: Held that the children were not intended to take vested interest until they attained 25, and that, therefore, the bequest to them was void for remoteness.

June 22, 1830.

JOHN SPILLER by his will, bearing date the 15th day of September 1815, devised and bequeathed the whole of his real and personal estate and effects unto his brother, William Spiller, and Charles Hobbs, and to the survivor of them, and to the heirs, executors, or administrators of such survivor, upon trust, whereas he had already, upon the marriage of his daughter Sarah Judd, with William Judd vested, in the names of his said brother William Spiller and Charles Hobbs, certain leasehold premises and property, to the amount of 300*l.* per annum, together with a house situate at Norwood, in trust for the use and benefit of his said daughter Sarah Judd, for the term of her natural life, independently of her husband; his will was, and he thereby ordered and directed that the value of the said property or annuity of 300*l.* per annum, and the house at Norwood so vested in trust for the use and benefit of his said daughter Sarah Judd as aforesaid, should be considered to be part of the residue of his real and personal estate and effects, it being his will and desire that his three children, the said Sarah Judd, Mary Caroline Haswell, and Lavinia Spiller might have, share and share alike, of his property as they had of his affection, and that the whole of such the residue of his estate and effects, both real and personal, might vest in his said trustees, in trust for the sole use and benefit of his said three children, Sarah Judd, Mary Caroline Haswell, and Lavinia Spiller, in manner and form thereinafter expressed and declared concerning the same, that is to say, upon trust that the said trustees should stand seized and possessed of all the residue of his real and personal estate as aforesaid, subject to the annuities and legacies given in and by his will, in trust, as to one third part thereof, for the use and benefit of his said daughter, Sarah, for life, independently of her then present or any future husband, and not be subject or liable to the debts, engagements, intermeddling or control of the said William Judd, or any future husband. And he directed the trustees of his will for the time being, to pay into the proper hands of his said daughter Sarah, during her life, the full one third part or share of the net rents, issues, and profits, arising or to arise, out of the residue of his real and personal estate and effects; and, upon the death of his daughter Sarah, it was his will and desire that his said trustees should stand seized or possessed of the

said one third part or share of his residuary estate, in trust for the child or children of the body of his said daughter Sarah, lawfully begotten, if more than one, share and share alike, according to the nature and quality thereof, and to be paid, assigned, and transferred to them, by his trustees, upon their severally and respectively attaining the age of 25 years; but, in case his said daughter Sarah should leave but one child her surviving, then the whole of such one third part or share of the residue of his real and personal estate and effects, should go to and become the property of such only child, upon his or her attaining the age of 25 years, and be transmissible to his or her heirs, executors, or administrators, and, in case his said daughter should leave no child of her body her surviving, or in case she should leave a child or children, who should not attain the age of 25 years, then he directed that the said one third part or share of the residue of his real and personal estate and effects so bequeathed, to his said daughter Sarah, for her life and her children as aforesaid, should go and accrue to the survivors or survivor of them, his said daughters Mary Caroline Haswell and Lavinia Spiller, and be subject to the same trusts, for the benefit of them and their respective children, as were thereinafter mentioned and directed with respect to their original third parts or shares therein given, devised and bequeathed to them: and the testator, after stating that he had furnished the house of his daughter Sarah at Norwood, and it being his intention to put his three children as much upon an equal footing as possible, gave, to each of his two daughters, Mary Caroline Haswell and Lavinia Spiller, 800*l.* as an equivalent for the furniture given to his daughter Sarah as aforesaid, unless he should, in his lifetime, give, to his said two daughters respectively, an equivalent for such furniture: And as to, for and concerning one other third part or share of his residuary estate, he gave, devised, and bequeathed the net rents, issues, and profits arising or to arise therefrom or thereout, to his daughter Mary Caroline Haswell, for her own absolute use and benefit, for her natural life, independently of any husband she might intermarry with, and from and after her decease, it was his will and desire that his trustees should stand seised or possessed of the said one third part or share of the said residuary estate, in trust for the child or children of the body of his said daughter Mary Caroline Haswell, lawfully to be begotten, if more than one, share and share alike, upon their severally and respectively attaining the age of 25 years, and if she should leave but one child her surviving, who should attain the age of 25 years, then the whole of such one third part or share of his residuary estate and effects should go to such survivor, his or her heirs, executors or administrators; but, in case their should be no such child of her body who should attain the age of 25 years, then the said one third part or share of his said residuary estate should go and accrue to the survivors or survivor of his daughters Sarah and Lavinia, and be subject to the same trusts, for the benefit of them and their respective children, as was therein mentioned and directed with respect to their original third parts or shares, in case they or either of them should die without a child, or leaving children who should not attain the age of 25 years: And as to the net rents, issues, and profits arising out of the remaining equal one third part or share of the said residue of his real and personal estate and effects, he gave the same to his said trustees, upon trust for the use and benefit of

his daughter Lavinia Spiller, and to be paid to her, by them, from time to time, as the same should come to their hands, for her own use and benefit, during the term of her natural life, independently of any husband she might intermarry with, and that, in all things the said one third part of his said residue should go to his said daughter Lavinia, in the same manner and form as the two third parts or shares of the residue of his estate and effects were given and bequeathed to his daughters Sarah and Mary Caroline Haswell for life; and that, from and after her decease, it was his will and desire that his said trustees should stand seised or possessed of the said one third part or share of his residuary estate, in trust for the children of the body of his said daughter Lavinia, lawfully to be begotten, if more than one, share and share alike, upon their severally and respectively attaining the age of 25 years; and, if she should leave but one such child her surviving, who should attain the age of 25 years, then the same to go to such only child upon his or her attaining the age of 25 years, and be an interest transmissible to his or her heirs, executors or administrators; and in case his said daughter Lavinia, should have no child of her body lawfully begotten, who should attain the age of 25 years, then the said one third part or share of the said residue of his real and personal estate and effects should go and accrue to the survivors or survivor of them, his said daughters Sarah and Mary Caroline, and be subject to the same trusts, for the benefit of them and their respective children, as thereinbefore mentioned with respect to the other two original third parts or shares of the residue given to his daughters Sarah and Mary Caroline as aforesaid: and in default of issue of his said three children who should attain the age of 25 years, then it was his will and desire that his trustees should stand seised and possessed of the said residue of his real and personal estate and effects, in trust for such person and persons as would be his real and personal representatives, in case he had died intestate, and of their respective heirs, executors, and administrators, absolutely, for ever. Provided always that it should be lawful for his said trustees or trustee, as the case might be, from time to time, at his or their discretion, to pay and apply all or any part of such rents and profits, or other moneys as should be, by virtue thereof, in his or their hands, in trust nevertheless either absolutely or most presumptively for the benefit or advantage of any child or children of his said daughters, who should be under the age of 25 years, for and towards the maintenance and education, putting out apprentice, advancement or preferment in the world, or other necessary use or uses of such child or children respectively. And the testator gave to the husband who should survive any or either of his daughters the sum of 200*l.* per annum, during his life, to be paid to him quarterly, by his trustees or trustee, by even and equal quarterly payments in the year, the first of which payments should begin and be made at the end of three calendar months next immediately after the death of any such deceased daughter, and in case such daughter should leave no child here surviving, then the said annuity of 200*l.* should be paid out of the general residue of his real and personal estates; but in case such daughter should leave a child or children her surviving, then the said annuity of 200*l.* should be paid out of the third part or share of the residue of his said real and personal estates so given and bequeathed,

as aforesaid, to the children or child of that daughter, after her death, in order that none of his other daughters or their children should be affected or prejudiced thereby: And he appointed his brother William Spiller, and Charles Hobbs executors of his will.

The testator died on the 31st of October 1817.

The Bill was filed by the eight children of Mrs Judd, two of whom were born in the testator's lifetime, against the trustees of the will, and also against Mr and Mrs Judd, and Mr and Mrs Haswell and their children and against Lavinia Spiller. It charged that the plaintiffs took, under the will, a vested interest in the third part of the residue of the testator's real and personal estate, and that only the payment or transfer thereof were postponed until the plaintiffs should severally attain the age of 25 years. And it prayed that the rights and interests of the plaintiffs and all other persons claiming under the will and codicils, might be declared, and that the residue of the testator's real and personal estate might be ascertained and secured.

The defendants, Mr and Mrs Judd, demurred for want of equity.

Mr Knight and Mr G. Richards, in support of the demurrer:

There is no gift to the children of Mr and Mrs Judd, until the attainment by them of the age of 25 years: therefore the primary gift is as void as the limitation over. There being here no gift independent of the time of payment, the court can not hold the gift to be immediate in vesting, and that the payment only is postponed.

Mr Wright in support of the bill:

In Steadman *v.* Palling, 3 Atk. 423. See 427, Lord Hardwicke says: "The rule and distinction is that, if a legacy be devised to one generally, to be paid or payable at the age of 21, or any other age, and the the legatee die before that age, yet this is such an interest vested in the legatee, that the executor or administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself." In Leake *v.* Robinson, 2 Mer. 363, the gift was different from what it is in this case; for there the interest only was given until a particular period; but here the principal is given in the first instance. In this case too maintenance is given; which, to use the language of the Master of the Rolls in Ross *v.* Ross, 1 Jac. & Walk. 154, is always a feature of vesting. Some of the children of Mr and Mrs Judd were born prior to the testator's death, and others subsequently to that event.

The Vice-Chancellor. The gift, in case Mrs Judd should leave one child only her surviving is clearly contingent on that child attaining the age of 25 years; and the same construction must be put upon the gift in case she should have more than one child: and, when we look at the bequests in favour of the children of Mrs Haswell and Lavinia Spiller, the question is placed beyond all doubt.

Demurrer allowed.

## Kime *v.* Welfitt.*

3 *Simons*, 533.

Testator directed the interest of his residue to be paid to his wife, for the maintenance of herself and her children, until the death of her father, when it was to cease, and to be accumulated for the children, (the testator having understood that his wife's father had made ample provision, by his will, for the testator's wife and children) and the testator directed his residue, and the accumulations, to be transferred to his children when the youngest attained 21, with benefit of survivorship on their dying under 21 and without issue, but if having issue, then the issue to take the deceased parent's share with a bequest over in case all the children died under 21, and without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The court refused to allow maintenance out of the residue, to the testator's infant children, although the legatees over consented to the application.

June 22, 1830.

THE VICE-CHANCELLOR. In this case William Petch Kime, by his will, dated the 18th of November 1823, gave the residue of his personal estate, and all moneys to arise from the sale of his real estates, and the rents of them until such sale to Wm. Teale Welfitt and Samuel Welfitt, upon trust to convert so much thereof as should not consist of money, into money, and invest the same in government or real securities, and to hold them, in trust, after payment of certain annuities therein mentioned, to pay the surplus of the interest, dividends, and annual proceeds thereof to his wife for the maintenance and support of herself and her children, and such other child or children as might be born after his decease, until the death of his wife's father, Thomas Nowill, at which time it was his will and mind that the payment of such interest, dividends and proceeds should cease, and not be paid to his wife, but should, after the death of Thomas Nowill, accumulate for the benefit of his said children, and such other child or children as might be born after his decease, until the youngest of such children should attain his or her age of 21 years, he having understood, from Thomas Nowill, that he had by his will, made ample provision for his said wife and children after his decease: and his will and mind was that the said accumulations should be placed out at interest, by his trustees, in like manner as the residue of his personal estate and effects was thereinbefore directed to be placed and put out: and that the trustees should, after the decease of Thomas Nowill, stand possessed of the said residue of his personal estate, and all accumulations to arise from the income thereof, in trust to transfer the same equally amongst the said children, and such as might be born after his decease, when and so soon as his youngest child should attain 21 years, with benefit of survivorship, if any of his said children, or such child or children as might be born after his decease, should die under the age of 21 years:

* *Ex Relatione.* The facts of the case are sufficiently stated in the judgment.

Provided that, in case any of his said children or child should die under 21, leaving issue, such issue should be entitled to such share of the trust premises as his, her or their parent or respective parents would have been entitled to, if he, she, or they had lived to attain 21, although no interest therein, in the mean time, should vest in him, her or them, so as to enable him, her or them respectively, to give or dispose of, or charge or incumber the same until the attainment of that age: Provided that, if all his children should die under the age of 21 years without leaving lawful issue then living, his trustees should stand possessed of the trust funds and all accumulations thereof, in trust for his the said testator's brothers and sisters who should be living at the death of his last surviving child, share and share alike: and he appointed Wm. Teale Welfitt and Samuel Welfitt executors of his will, and committed, to them and his wife, the guardianship, custody and care of all his children during their respective minorities; and he declared that the guardianship of his wife should cease if she married again. The testator died on the 3d of October 1825, and left his wife and two infant children, the plaintiffs, Wm. Thos. Kime and Harriott Arabella Kime him surviving; and the testator also left two brothers and one sister, who are defendants in the suit, him surviving. Thomas Nowill died on the 5th of June 1825, having made a will, in which there was not any provision for the infant plaintiffs. Under these circumstances they claim an allowance for maintenance and education out of the residuary fund in the hands of the executors. The brothers and sister of the testator give their consent to this application: but it appears that there may, by possibility, be other claimants. Some issue may come into existence who will be entitled to the accumulated fund; and I am not aware of any case which would authorize me to effect their rights. The court can not vary or invalidate them, as it would do by supporting the plaintiff's claim; and, therefore, I can not give the direction prayed.

## Murray *v.* Samson.

*3 Simons, 536.*

A testatrix directed her residuary estate to be divided into three equal shares, and gave one share to the children of I. M.; one share to the children of W. H. (subtracting from their share the 2,000*l.* that W. H. owed the testatrix), and the remaining third part to the children of R. H. Held that the 2,000*l.* was to be considered as part of the residue; that the residue was to be divided into three equal parts, and that the 2,000*l.* was to be taken as part of the share of the children or W. H.

July 7, 1830.

MARGARET HAMILTON, by her will, disposed, of her residuary personal estate, in the following words: "I desire that the residue of my property be divided into three equal shares: one share I give to the child or children of Isabella Murray: one share I give to the children of William Hamilton, living at the time of my death, sub-

tracting from their share the 2,000*l.* their father owes me: one share I give unto the four children of Robert Hamilton. All the abovementioned shares I desire may be divided equally among the children so named, with benefit of survivorship, after the youngest child attains 21."

The question that arose upon the construction of the above clause in the will, were, 1st, whether the 2,000*l.* was to go to the next of kin of the testatrix as undisposed of; 2d, whether it was to be divided, equally, amongst the three classes of residuary legatees; 3d, whether the share of the residue which the children of William Hamilton were to take, was to be less, by the debt of 2,000*l.* than the shares of the children of Isabella Murray and Robert Hamilton.

The Solicitor-General, Mr Pepys, Mr Rose, Mr Roupell, Mr Phillimore, Mr Turner, and Mr James Russell, appeared for the different parties in the cause.

The VICE-CHANCELLOR. Suppose that the whole residue amounted to 7,000*l.*, then my notion is that the children of Isabella Murray and also the children of Robert Hamilton, are to take 3,000*l.* amongst them, and that the children of William Hamilton are to take 1,000*l.* and the debt.

"Declare that the sum of 2,000*l.*, due by the defendant, Wm. Hamilton, to the testatrix, at the time of her decease, is to be considered as part of the residue of her estate, and that the residue of the testatrix's estate ought to be divided into three equal parts, and that the plaintiff (the only child of Isabella Murray) is entitled to one third part thereof, and that the defendants, Mary Ann Hamilton, Caroline Hamilton, and Wm. Hamilton, the surviving children of Robert Hamilton, are entitled to one other third part thereof, and that the defendants, Wm. James Hamilton, Jane Hamilton, and Frederick Hamilton, the children of the defendant Wm. Hamilton, are entitled to the remaining third part of such residue, and that the said sum of 2,000*l.* is to be taken as part of such last-mentioned third part. And let the defendant, Henry Morse Samson, prove the said sum of 2,000*l.* against the estate of the said Wm. Hamilton, under the commission awarded against him, at the next general meeting under the said commission, for the benefit of the defendants, his children. And declare that the said defendants, the children of the said defendant Robert Hamilton, and the said defendants, the children of the defendant Wm. Hamilton take vested interests in their shares of such residue on attaining their ages of 21 years."

## Goodere *v.* Lloyd.

3 *Simons*, 538.

A. having power to appoint 700*l.* which was to be raised under the trusts of a term, by her will, appointed that sum, to the persons whom she made her executors, *in trust*; but she did not declare, expressly, any trust of that sum. She then bequeathed her

[Goodere *v.* Lloyd.]

personal estate, to the same persons, in trust and subject to the payment of her debts and legacies. Held, in suit instituted by the legatees, that the 700*l.* ought to be raised, and applied in the same manner as the testatrix's personal estate.

July 12, 1830.

BY the settlement on the marriage of Lewis Price with Mary Lloyd, dated in September 1788, certain real estates in Wales, were limited to Lewis Price and Mary Lloyd, for their lives, successively, with remainder to the sons and daughters of the marriage, in the usual manner, with remainder to Silvanus Lloyd, for 500 years, upon trust, to raise the sum of 700*l.*, to be paid and applied to and among such person or persons, and to and for such use and uses, and at such time or times, and in such parts, shares and proportions, manner and form, as Mary Lloyd, by any deed or deeds, writing or writings, to be by her signed, sealed and executed in the presence of, and attested by two or more credible witnesses, or by her last will and testament, to be by her duly executed and testified in the presence of three or more credible witnesses, should direct, limit, or appoint.

Lewis Price died in the lifetime of his wife, and there was never any issue of the marriage. Mary Price, after the death of her husband, by her will, duly executed and testified, in the presence of three credible witnesses, and bearing date the 9th of July 1819, after reciting the settlement, and that Lewis Price had died without leaving any issue of the marriage him surviving, and that she was desirous to exercise the power given her by the settlement, in exercise of that power, gave and bequeathed, directed, limited and appointed the 700*l.* unto George Lloyd, Wm. Davies, Samuel Price and David Williams, *in trust*, and she thereby directed Sylvanus Lloyd to pay and apply the same accordingly. And she also gave, unto the same four persons, all her personal estate, whether consisting of plate, linen, china, household goods, furniture, money, bank notes, money out at interest upon mortgage, or upon government or any other security, and all other her personal estate and effects whatsoever, which she should be possessed of, interested in, or entitled to at the time of her decease, (save and except such articles of wearing apparel, table-linen, bedding, plate and books of her's as were marked with her name or initials, to be delivered, by her executors, to David Lloyd, to be kept, preserved and delivered by him to his daughter, Mary, when she should attain the age of 21 years, or be married) in trust, subject nevertheless to, and charged and chargeable with the payment of her just debts, funeral and testamentary expenses, and to the payment of the several legacies and annuities by her thereinafter given; and she thereby gave and bequeathed, unto David Lloyd, an annuity of 20*l.* for his life, and, from and after his decease, she gave and bequeathed the sum of 400*l.*, from which that annuity was to accrue, to his daughter, Mary, as soon as she should attain the age of 21 years; and she also gave and bequeathed to the plaintiffs, Morgan Harris Goodere, Catharine Goodere, David Goodere, and Mary Anne Goodere, the infant children of Michael Goodere, the sum of 50*l.* each, and to be paid to each and every of them when they should respectively attain the age of 18 years. And she gave and bequeathed, to John Price, the sum of 100*l.*, and to Martha, the wife of Richard David, the sum of 5*l.*, and to Sarah Davies the sum of 10*l.*,

and to Anne, the widow of Thomas Moses, the sum of 5*l.*, and to Nathaniel Edwards and Thomas Davies an annuity of 5*l.*, upon the trusts and for the purposes therein mentioned. And she appointed George Lloyd, Wm. Davies, Samuel Price and David Williams executors in trust of her will, to whom she committed the disposal of all her good, chattels, and personal property.

Mrs Price died soon after the date of her will.

The bill was filed by the infant children of Michael Goodere, on behalf of themselves and all the other legatees named in the will. It prayed that it might be declared that the power given, to Mary Price, by the settlement, of appointing the 700*l.*, was well executed by her will, and that the 700*l.* was subject to the payment of the pecuniary legacies given by her will, either originally, or in case her personal estate being insufficient for the payment thereof; and that the 700*l.* might be raised, and that, out of that sum, and the personal estate of Mary Price, or one of those funds, the legacies given to the plaintiffs might be set apart and invested for their benefit, until the same should become payable to them; and that the legacies given to the other legatees, who should seek relief by and contribute to the expense of the suit, might be paid thereout.

The defendants who were entitled to the estates subject to the term, by their answer, said that the personal estate of the testatrix was more than sufficient for the payment of the legacies and annuities bequeathed by her will, and that all such legacies and annuities had, long since, been fully answered by and out of the same, and that there remained a considerable residue of such personal estate: that they were advised that Mary Price having, by her will, given and appointed the 700*l.* to Lloyd, Davies, Price and Williams, upon trust, and having directed the same to be paid accordingly, without having declared any express trust thereof, the appointment of the 700*l.* thereby attempted to be made, was wholly void, there being no object pointed out for whose benefit the same could take effect, and that the 700*l.* had sunk into the inheritance of the estates; but that if, in the opinion of the court, the bequest or appointment of the 700*l.* was not wholly void, then they insisted that Mrs Price's personal estate ought to be applied, in the first place, in payment of her funeral and testamentary expenses, debts and legacies, and that the 700*l.* ought only to be resorted to in the event and so far as the personal estate should prove insufficient for the payment thereof.

Mr Knight and Mr Wilson, for the plaintiffs.

The Solicitor-General and Mr Williams for the defendants who were entitled to the estates comprised in the settlement, subject to the term:

Admitting that Mrs Price's will was a due execution of the power, there was not such a dedication of the 700*l.* as amounts to a declaration of trust. If there was not a due declaration of trust, the 700*l.* must sink into the inheritance. Sidney *v.* Shelley, 19 Ves. 352; S. C. Coop. 206; Amphlett *v.* Parke, 1 Sim. Rep. 275. The testatrix has declared a trust as to her own property, but that can not be held to apply to property which she had a power to make her own. There is not a word,

in this will that applies to the 700*l.* The residuary disposition related to the testatrix's own goods and chattels only. Mallabar *v.* Mallabar, Ca. Temp. Talb. 78, has always been considered as a decision that ought not to be followed.

Mr Pepys, Mr Spence, Mr G. Richards, and Mr Berry appeared for other defendants in the suit.

The Vice-Chancellor. My notion is that, where there is a gift to executors, in trust, the executors take the gift as part of the testatrix's personal estate; and, if the legacies given by the will are not sufficient to exhaust the personal estate, then that the surplus goes to the persons who are entitled to the testatrix's residuary estate.

Declare that the 700*l.* is well appointed, and is a charge, upon the estates mentioned in the pleadings, with interest thereon, at 4*l.* per cent., from the 9th of July 1819.

## Bradly *v.* Heath.

3 *Simons*, 543.

B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same, at 5*l.* per cent., until the same is settled:" Held that the executors were personally liable to pay the debt and interest.

Where a bill sought either to charge the surviving executors of a testator, personally, with a demand, or to have the debt paid out of the assets of the testator; and the court decided that the surviving executors were personally liable; held that the representatives of a deceased executor were entitled to have the bill dismissed against them, with costs.

July 12, 23, 1830.

RICHARD BLUNDEN the elder, was, at his death, indebted to George Glover, a wheelwright and blacksmith, for work done upon his farms, in the sum of 714*l.* 14*s.*, subject to a counterclaim, on the part of Blunden, against Glover, for 75*l.* 12*s.* 1*d.*, making the sum actually due to Glover, 639*l.* 1*s.* 11*d.* Blunden died on the 22d of February 1814, having appointed his son Richard Blunden the younger, and John Hancock Buckle, James Eggar, Wm. Heath, and Henry Andrews executors and trustees of his will, in which was contained a trust for payment of his debts. The trustees and executors carried on the testator's farming business, until the death of Richard Blunden the younger, which happened in June 1815. Richard Blunden the younger, appointed Eggar, Buckle and John Clark executors of his will. John Clark afterwards died, having, by his will dated the 9th of October 1819, appointed Henrietta Maria Clark, Wm. Hankin, and the plaintiff Bridger Bradly his executors. After the death of Richard Blunden the younger, the surviving trustees and executors of Richard Blunden the elder, continued the farming business on behalf of his estate; and the trustees and

executors, both in the lifetime and after the death of Richard Blunden the younger, employed Glover to do the wheelwright's and blacksmith's work on the farms. On the 29th of December, 1815, a meeting of the creditors of Richard Blunden the elder took place, at which Glover was present; and, on that occasion, the executors and trustees produced an account of the assets of Richard Blunden the elder, by which it appeared that the assets would be more than sufficient to pay all the debts of Richard Blunden the elder; and John Hancock Buckle then requested the creditors to wait, for payment of their debts, until the leases of the farms were run out, and said that, if they did wait, they would be paid their debts, and, if not, that the executors would be forced to break up the concern. At this meeting Glover produced his account, which was as follows:—

"The executors of the late
Mr *Richard Blunden*, sen., deceased,
To *George Glover*.

| 1814: | | £. | *s.* | *d.* |
|---|---|---|---|---|
| Mar. 11. | To account delivered - - - - | 714 | 14 | 0 |
| | The executors' charge against me is - | 75 | 12 | 1 |
| | | 639 | 1 | 11 |
| | One year's interest on 639*l.*, at 5 per cent. per annum - - - - - - - | 32 | 0 | 0 |
| | | 671 | 1 | 11 |
| Jan. 1815. | To a bill delivered for the year 1814 - | 85 | 19 | 11 |
| | | 757 | 1 | 10 |
| Jan. 1816. | One year's interest on 757*l.* 1*s.* 10*d.* for the year of 1815 - - - - - | 37 | 17 | 0 |
| | | 794 | 18 | 10 |
| | Wheelwright's and smith's work for the year 1815 - - - - - - - | 75 | 3 | 4½ |
| | | £. 870 | 2 | 2½" |

This account was examined and approved of by the executors and trustees; and Glover, having consented to wait for payment of his demand, on condition of his being allowed interest, on the amount, at 5 per cent., which was acceded to by the executors and trustees, J. H. Buckle wrote the following memorandum on the back of the account, and he and the other executors and trustees signed it:

"Mr Glover having consented to wait for the payment of the within account, amounting to 870*l.* 2*s.* 2½*d.*, we, as the executors of Mr Blunden, engage to pay Mr Glover interest for the same, at 5 per cent. per annum, until the same is settled.—29th December 1815."

In the course of the year 1816, the surviving executors of Richard Blunden, the elder, became further indebted to Glover, for work done on the farms; and, on the 8th of January 1817, his solicitor wrote to them as follows:

"Gentlemen, I am desired by Mr George Glover, of Holybourn, to

apply to you respecting a debt of 671*l.* and upwards, due to him from the estate of the late Richard Blunden, of Holybourn, deceased, for work and labour, materials, &c., in the business of a wheelwright and blacksmith, at the time of his death, the particulars of which, I understand, have been delivered to you; and, also, for interest due thereon, according to an agreement. Mr Glover also claims, from you, the amount of certain bills for smith and wheelwright's work, &c., for the years 1814, 1815, and 1816, done and performed under your own directions, with interest, as by agreement. It is not without much regret that Mr Glover finds himself driven to the necessity of applying thus to you, and insisting on a settlement of these accounts without delay. The matter is, as you must suppose, of too serious a nature for him to admit of his giving further time, or suffering the amount of the latter account to be increased by further work, &c. He understands that interest on the bond debts has been suffered to accumulate to the injury of the other creditors, and the family have (as he conceives) been thus supported by a diminution of the assets, contrary to law. The rents have been suffered to be in arrear and unpaid, and one of the sons has been permitted to sell corn and apply the money to his own use. Under these circumstances I am sure you will not wonder at Mr Glover's being uneasy and dissatisfied, or blame him for the steps he is resolved to take, to secure his heavy debt. He can not suffer a speculation to go on at his expense, however well intended, by you, gentlemen, as friends to the family. He is satisfied your own intentions are honourable, yet he can not give his assent to measures in which such serious risk is involved. To save long correspondence on this business, I am sorry to be obliged to inform you that, unless payment, or an arrangement is immediately made, to the entire satisfaction of Mr Glover, a bill in chancery will be filed, and such other steps taken as Mr Glover shall be advised, to recover these respective debts."

On the 13th of May 1817, J. H. Buckle wrote a letter to Glover, in the following words:

"The executors of Mr Richard Blunden, deceased, have requested me to submit the following statement for your consideration, and to request your instructions thereon. Mr Blunden died in 1814, and, by his will, devised and bequeathed all his real and personal property, consisting of about 20 acres of freehold land and considerable farming stock, to his trustees, subject to the payment of his debts, &c., and directing them to carry on the business, for the benefit of his family, until the youngest child should attain the age of 21. In compliance with this direction the executors have continued to carry on the business, but the difficulties they have had to encounter, in consequence of the severe pressure of the times, have materially cramped their exertions in relieving the deceased's estate from the charges upon it, and some of the creditors have expressed their desire that the business should not be continued any longer, but that application should be made, to the landlord, for permission to sell the leases of the farms, and that, if such permission can be obtained, that the stock and crops should be immediately disposed of. The executors have every wish to act for the benefit of the creditors, and, much as they must regret the total ruin of the unfortunate children, it has been their anxious desire to protect and serve, yet they feel their duty paramount to every other consideration,

and are perfectly ready to carry the wishes of the creditors into effect. The executors, however, feel considerable difficulty as to the disposition of the property, at the present moment, under the great disadvantages which present themselves, and they can not but point out to the creditors that the lands are in a state of cultivation, and cropped in such a way, as affords a well-grounded hope that the ensuing season may be productive of beneficial results to the creditors and family. Under these circumstances I have to request your sentiments and directions as to the course to be pursued. And I should, at the same time, state that, in the event of the executors disposing of the lands and effects, at the present period, they will be following the express directions of the creditors, and, therefore, it must be distinctly understood, that the executors will not be responsible for any loss that may arise from the sacrifice which, in all probability, will be made. Waiting your answer, I am, &c."

In answer to this letter, Glover, on the 16th of May 1817, wrote to the executors as follows:

"Sirs, I can not interfere with the executors and trustees of Mr Blunden, or direct them, in any way, in the duty they have to perform. I hope and trust that, as there were sufficient assets to pay every one, at Mr Blunden's death, I shall be paid the amount of the debt then due to me, as well as the debt incurred by yourselves."

After the year 1816, the executors and trustees became further indebted, to Glover, in the sum of 265*l.* for work done by him upon the farms, and goods supplied; and, in addition to the demand so settled and allowed as before mentioned, he charged them with the sums which so became subsequently due to him. On the 16th of January 1818, and the 18th of October 1818, they paid to Glover two sums of 150*l.* each, generally on account of his demand, and they entered these payments in a book kept by them, as the surviving executors of Richard Blunden the elder, in the following manner:

"1818, January 16: Paid Mr Glover, for money due to him, from the executors of Richard Blunden, for smith's and wheelwright's work, 150*l.*—1818, October 12: Paid Mr Glover, in part of money due to him from the executors, 150*l.*"

In May 1830, Glover died, having bequeathed the residue of his personal estate to the children of his daughter Elizabeth Bradly, and appointed John Bradly, Bridger Bradly, John Langrish, and Wm. Heath, his executors. On the 22d of February 1821, J. H. Buckle wrote a letter to the solicitor of Glover's executors, in which there was the following passage:

"*In re* Glover.—I shall be glad to hear from you what are the executors' views in regard to Blunden's Debt to them. For myself and co-executors, I can only say, we offered in writing, long ago, during Mr Glover's life, to adopt the wishes of the creditors, and to close the business carrying on; but that no such desire was expressed. It is quite impossible that we can make any separate arrangement with Mr Glover's executors."

The bill was filed on the 15th September 1824, by J. Bradly, B. Bradley, and J. Langrish, against William Heath, Henry Andrews, James Eggar, J. H. Buckle, Henrietta Maria Clark, and Wm. Hankin, charging that Heath, Andrews, Eggar and Buckle were personally

liable, in respect of the sum mentioned in the memorandum of the 29th of December 1815, and also in respect of the work subsequently done by Glover; and that they, expressly, engaged to pay the same, and adopted, by the memorandum, the whole of the balance therein mentioned, as a debt from themselves, personally: and, if not, yet that the memorandum, and the account produced by the executors, as before mentioned, were and ought to be taken as an admission of assets for payment of the debts of Richard Blunden the elder, and, particularly, for payment of the debt due to Glover: that, as Heath was one of the executors of Glover, no action at law could be brought to recover the debt due to his estate, but that the plaintiffs were entitled to have the demand enforced in a court of equity: that assets, more than sufficient for the payment of the demand, had come to the hands of Heath, Andrews, Eggar and Buckle; and, if assets sufficient for that purpose were not then in their hands, they had wasted and misapplied the same: that the defendants pretended that the plaintiff's demand was barred by the statute of limitations; but the plaintiffs charged that such demand had been repeatedly admitted and recognized, by the executors of Blunden the elder, within six years before the filing of the bill, and that payments on account of such demand, had been made within that period, and that receipts had been given, by Glover, for the same; and that such receipts were in the possession or power of the defendants, the surviving executors and trustees of Blunden the elder, and that entries of such payments, in the handwriting of J. H. Buckle, were made, in a book kept by the executors, in which they had taken credit for such payments, in an account of their receipts and payments respecting the estate of R. Blunden the elder. The bill prayed for an account of what was due, to Glover's estate, in respect of the 870*l.* 2*s* 2½*d.* and interest thereon, and of the work subsequently done, and goods supplied by Glover, and that Heath, Andrews, Eggar and Buckle might be declared to be personally liable to the payment thereof, and might be decreed to pay the same accordingly; or, if the court should be of opinion that, as to so much of the debt due to Glover's estate as became due in the lifetime of Blunden the elder, the demand of the plaintiffs was against his assets, that an account might be taken of his assets come to the hands of his surviving executors and trustees, and of Richard Blunden the younger, and that the surviving executors might be decreed to pay so much of Glover's demand as became due subsequent to the death of Blunden the elder, and that the assets of Blunden the younger, if necessary, might also be made liable for so much thereof as became due between the time of his father's decease and his own.

The defendants, the surviving executors, in their answer, said that the memorandum was not intended to bind or affect them personally, or to do more than to make Glover's debt a debt carrying interest as against their testator's estate: that they, as such executors as aforesaid, and not otherwise, did become further indebted to Glover, for work done on the farms, in the sum of 265*l.*, and that they paid, to him, the two sums of 150*l.*, at the times before mentioned, on account and in respect of what had become due to him since the testator's death, but, in the first place, on account of what had so become due since the memorandum, and that the remainder of the debt due to Glover's es-

tate: that they had taken credit, for the two payments of 150*l.*, in an account of their receipts and payments respecting their testator's estate: that they and Richard Blunden, the younger, employed Glover, as the trustees and executors of R. Blunden the elder, and in their representative characters, and without any intention of making themselves personally liable, and that the debt due to Glover, for work done since the testator's death, had been fully paid and discharged, by the payment, to him, of the two sums of 150*l.*, and therefore, if any money did become due, from them, personally, to Glover, the whole thereof had been paid: that assets sufficient for payment of all the debts of Richard Blunden the elder, had not come to their hands, or to the hands of Richard Blunden the younger; but they insisted that the sum mentioned in the memorandum, as well as the sums that became subsequently due to Glover, were payable only out of the assets (such as they were) of Richard Blunden the elder: and they claimed the benefit of the statute of limitations.

In 1825, J. H. Buckle died, intestate, and the suit was revived against Wm. Buckle, his administrator.

The Solicitor-General and Mr Garratt, for the plaintiffs:

The executors and trustees, by signing the memorandum of the 29th of December 1815, incurred a personal obligation to pay the whole amount of the debt then due to Glover, with interest at 5 per cent.: and, as they continued to carry on their testator's farming business, they are, beyond doubt, bound to pay the subsequent debts. The executors and trustees, in their transactions with Glover, could not be dealing with the assets of their testator, because they could not make them liable to pay interest at 5 per cent. They contend that the two payments of 150*l.* were made in discharge of the debts which they incurred subsequently to the testator's death, and that no part of those payments ought to have gone in extinguishment of the original demand; and, then, they say that the testator's estate is not liable, on account of of the statute of limitations. Now the payments made after the settlement in 1815, exceeded the amount of the debts that subsequently became due, and the excess must be applied to the liquidation of the original debt, the effect of which is to get rid of the statute of limitations. Every payment made by a creditor to his debtor, may be attributed by the receiver as he pleases, if there is no appropriation by the payer; and it appears, by the entries in the books kept by the executors, that the payments of 150*l.* were made, generally. Besides, how can the statute of limitations be set up in a case like the present, where the defendants have been dealing with the debt, entering into a contract to pay interest on it, and have been writing letters in which they treated the recognized Glover as a creditor on the estate. Then it is said that this case falls within 9 Geo. 4, c. 14. That act did not take effect until the 1st of January 1829; (which was long after the institution of this suit); and it has no retrospective operation. Towler *v.* Chatterton, 6 Bing. 258. We do not rely on parol promises, but on part payment, and admissions in writing, particularly, in Buckle's letter of the 22d of February 1821. The memorandum unites the debt due at the death of Blunden the elder, with the debts which were subsequently incurred. The executors were personally liable for part of

the debt, and, therefore, they must have intended to make themselves liable for the whole. The cases on which we rely in support of our claim against the executors personally, are Rose *v.* Bowler, 1 H. Blackst. 108, Child *v.* Monins, 2 Brod. & Bing. 460, Barker *v.* Parker, 1 T. R. 287, Barry *v.* Rush, 1 T. R. 691, Appleton *v.* Binks, 5 East. 148, Burrell *v.* Jones, 3 Barn. & Ald. 47, Leadbitter *v.* Farrow, 5 M. & S. 345.

Mr Horne and Mr Wright, for the defendants, Eggar, Heath and Andrews:

The case of Appleton *v.* Binks is distinguishable from the present; for if the party did not bind himself in that case, it is difficult to say how a party could bind himself. There was no pre-existing debt; and there was no other property to which the party could resort. The remedy was founded on the instrument only. In Burrell *v.* Jones, the undertaking admitted of no other construction than that which was put upon it by the court. That undertaking either meant what the court decided, or it meant nothing. The memorandum of December 1815 contains no promise to pay the principal debt. The effect of it was merely to make interest payable on the pre-existing debt; and the parties, who signed that memorandum, did not engage in writing, to pay the debt of another. It has been said that Glover had a right to apply the payments that were made to him, to whichever debt he pleased. Now let us see how it is stated on the record. The bill states that, on the 16th of January 1818, Heath, Andrews, Eggar and Buckle paid, to Glover a sum of 150*l.* generally, on account of his demand; and that, on the 12th of October 1818, they paid him, generally, on account, the further sum of 150*l.*, but that the remainder of the said demand, together with an arrear of interest on the whole of the said debt, remained due and owing to Glover's estate. Now what debt was there carrying interest, except the debt mentioned in the memorandum? The allegation in the bill is that the payments were not at all attributable to the interest, but that all the interest remained due. We do not mean to argue that the plaintiffs are not entitled to the ordinary decree for an account, against the estate of Richard Blunden the elder, but what we contend is that the remedy under the memorandum is gone. The bill was not filed till 1824, and the memorandum is dated in 1815. It is clear, therefore, that more than six years having elapsed between the date of the memorandum and the filing of the bill, the memorandum is a dead letter. In the letter written, by Glover's solicitor, on the 8th of January 1817, a clear distinction is made between that portion of the debt which he considered as due from the estate, and that portion of it which he considered as due, from the executors, personally. He treats the principal of the debt as due from the estate of Richard Blunden the elder, and the interest as due by virtue of the memorandum.

[The Vice-Chancellor:—This letter shows that Glover's solicitor did not know what he was writing about; for the debt which was contracted in 1816, did not bear interest.]

The facts of the case show that it was not Glover's intention that the executors should be personally liable to pay the debt. The letter agrees with the contract, which was an agreement to pay interest only on the debt. Glover considered the principal as due from the estate, and the

interest as payable under the memorandum. What did it signify to Glover that the interest on the bond debts had been suffered to accumulate, or that the family of the testator had been supported by a diminution of the assets, if his debt had been shifted from the estate, and the executors had become personally liable to him for it? All the expressions in the letter, especially those in which he says that he can not suffer a speculation to go on at his expense, and that he can not give his assent to measures in which such serious risk was involved, are perfectly unintelligible, unless they were used by a person who considered that he had a demand upon the assets of the testator. Glover had no right either to give or withhold his assent, unless he considered himself a creditor on the testator's estate. A bill in Chancery was the proper remedy for Glover to pursue, if he was a creditor on the testator's estate; but it was not the proper remedy, if the executors were personally liable to him. The letter written by Buckle on the 13th of May 1817, clearly shows that the executors thought that they had been dealing with a person who considered that he had a claim upon the assets of their testator. Glover, in his answer of the 16th of May 1817, meant to say, merely that he would not incur any responsibility, by directing the executors what they were to do with the assets, and that he should require to be paid the debt which was due to him at Blunden's death, as well as the debt which was due from the executors themselves. This shows that there was a debt due from the estate of Blunden the elder, as well as from the executors. The letter of the 22d of February 1821, written, by Buckle, to the solicitor of Glover's executors, proves that down to that time, Buckle considered the original debt as still due from Blunden's executors; and the whole of the correspondence clearly shows that it was not the intention, of any of the parties, that the executors should be personally responsible for the debt.

The only relief which the court can grant, is a decree for the usual accounts: for the debt which the executors incurred after the settlement in 1815, has been discharged by the payments that have been subsequently made. But, if the court should be inclined to think that the executors are personally liable for the debt, then our clients have a right to have the question tried at law, on their undertaking to admit that they are the only executors of Richard Blunden the elder.

Mr Cooke appeared for the defendants, Henrietta Maria Clark and William Hankin, the executors of John Clark; and Mr Webster for William Buckle, the administrator of J. H. Buckle.

The Vice-Chancellor. This appears to me to be a very plain case. It is impossible to consider this memorandum of the 29th of December 1815, except as a memorandum that binds the parties who signed it, personally: because the debt which was due from the testator, was not a debt that carried interest, neither can the debt which has accrued since the death of the testator, carry interest. And then the parties who subscribed their names to this memorandum state that: "Mr Glover having consented to wait for the payment of the within account, amounting to 870*l.* 2*s.* 2½*d.*, we, the executors of Richard Blunden, engage to pay Mr Glover interest for the same at 5 per cent. per annum, till the same is settled." The account so referred to, sets forth

the debt due at the death of the testator; it states the charge of the executors in the nature of a cross demand, and then strikes a balance, and calculates the amount of interest on that balance, and then it makes a further charge, and calculates interest also upon it, making the whole amount of principal and interest, after giving credit for the cross charge, to be 870*l.* 2*s.* 2½*d.* Now it is quite clear that these parties, as executors, could never be liable to pay interest on the debt due from the testator; but they, having the character of executors, and also being separate individuals, undertook to do that which, as executors, they were not bound to do. I think, therefore, that this memorandum must be taken to be a contract by them individually, to pay the interest; and, as they refer in it to the account, that it is an admission of the principal debt, as a debt due from them as individuals; and that it must be considered that they undertook to pay the principal as well as the interest of the debt.

Mr Horne made several observations upon the letters which were written subsequently to the memorandum being signed. I conceive that, if the letters themselves had disclaimed the benefit which Glover had obtained by means of this memorandum, then those observations would have been pertinent: but it is impossible to say that the mere circumstance of the debt being spoken of, as a debt existing at the time of the death of the testator, can be taken as an abandonment of the benefit given by this memorandum.

Then with respect to the mode in which the bill states the payments to have been made. I do not conceive that that forms the least distinction; and it does not appear to me that it at all varies the rights of the parties: because I take the rule of law to be, *solvitur ad modum solventis*. Where a party makes a payment, and gives a direction with respect to its application, the payment must be applied in the manner in which he directs. But if he does not give any direction, *solvitur ad modum recipienties*. If the party recipient does not make any specific appropriation of the payment, then it must be applied as the law directs. Now Mr Glover has done that which the law itself would have done. He has applied the money which he himself received, in satisfaction of the debt that was running on, and which did not carry interest, and then in payment of the interest of the debt, for the interest of which the memorandum provided, and my apprehension is that, according to the rules of law relating to this subject, the two payments of 150*l.* ought to have been applied in discharge, first of all, of the current debt posterior to the 29th of December 1815, and, next, in discharge, *pro tanto*, of the interest accruing upon the debt of 870*l.* I observe that Mr Glover seems to have considered that he should be entitled to charge interest on the whole balance; but that is a mistake. Subject however to the correction of that mistake, I think that the executors are personally liable to pay the 870*l.*, except so far as it is diminished by the application of the surplus, of the two sums of 150*l.* each, beyond the amount of the debt which had been incurred subsequent to the 29th of December 1815. I think that the matter is perfectly plain, and that it is not necessary to resort to law.

On this day the cause stood in the paper for the purpose of being

[Bradly *v.* Heath.]

spoken to as to the minutes of the decree: when Mr Cooke, on behalf of the defendants, Henrietta Maria Clark and William Hankin, contended that the bill ought to have been dismissed, with costs, as against those parties; inasmuch the plaintiffs having obtained a decree against the executors who signed the memorandum, personally, no direction was given for taking the accounts prayed by the bill in case the court should be of opinion that the executors were not personally liable to the demand.

Mr Garratt, *contrà*, contended that the plaintiffs were justified in framing the prayer of their bill, in the alternative; and that, as the defendants Henrietta Maria Clark and Wm. Hankin were, originally, necessary parties to the bill in that form, though the bill might be dismissed against them, it ought to be dismissed without costs.

The Vice-Chancellor said that the plaintiffs took no decree against the defendants Henrietta Maria Clark and Wm. Hankin, and, consequently, that the case was, in effect, abandoned as to those parties, and that the bill, as against them, must be dismissed with costs.

The minutes of the decree, as they were finally settled, were as follows:

"Dismiss the bill, with costs, as against the defendants Clark and Hankin. Let it be referred to the Master of this court in rotation, to compute interest upon the sum of 870*l.* 2*s.* 2½*d.*, the amount of the account or debt mentioned in the memorandum of the 29th of December 1815, from the said 29th day of December 1815, after the rate of 5 per cent. per annum. And let the said Master take an account of the debt incurred, by the defendants, Wm. Heath, Henry Andrews and James Eggar, and the late defendant, John Hancock Buckle, since deceased, four of the executors of the late Richard Blunden, on account of the estate of the late George Glover, deceased, subsequent to the said 29th day of December 1815; and, against such last-mentioned debt the said defendants, Wm. Heath, Henry Andrews and James Eggar, and the said late defendant John Hancock Buckle, are to have credit for so much as shall be necessary of the two sums of 150*l.*, making together the sum of 300*l.*, paid by the said defendants Wm. Heath, Henry Andrews and James Eggar, and the said late defendant John Hancock Buckle, on the 16th day of January 1818, and the 12th day of October, 1818, respectively, and the surplus of the said sum of 300*l.* is to be deducted from what the said Master shall find to be due, for interest, upon the said sum of 870*l.* 2*s.* 2½*d.*, and the surplus, if any, from the said sum of 870*l.* 2*s.* 2½*d.* And let the said Master state to the court what remains due for such principal and interest. And declare that the said defendants, Wm. Heath, Henry Andrews and James Eggar are personally liable, and that the estate of the said late defendant, John Hancock Buckle, is also liable for the said sum of 870*l.* 2*s.* 2½*d.*, and for interest thereon, after such deductions thereout as aforesaid: and, in case the said defendant, Wm. Buckle, the administrator of the estate of the said late defendant John Hancock Buckle shall not admit assets, &c."

No decree was drawn up, as the suit was settled without the parties going into the Master's office.

## Rude *v.* Whitchurch.*

3 *Simons*, 562.

If a plaintiff reads a passage in an answer, which does not refer to, but is qualified by, a subsequent passage, the defendant may read the latter passage.

July 23, 1830.

IN this case a question arose whether a defendant, after the plaintiff had read one passage of his answer, not referring to a subsequent passage qualifying it, could read the subsequent passage.

The Vice-Chancellor said that he took the rule now to be, where there was a passage in an answer relating to one part of a subject, and there was another passage of the answer relating to another part of the subject, not in the same sentence, but connected in meaning with the first passage, and the plaintiff read one of those passages, the defendant might read the other: that the Master of the Rolls had introduced that practice into his court, and that the Lord Chancellor had expressed his approbation of it. See Bartlett *v.* Gillard, 3 Russell, 156.

## Boys *v.* Williams.

3 *Simons*, 563.

Testatrix bequeathed to A. B. & C. D. "50*l.* each of Bank Long Annuities Stock, now standing in my name." Held that each of the legatees was entitled to a specific legacy of 50*l.* Long Annuities; and that evidence of the state of the testatrix's assets was not admissible.

July 13, 17, 1830.

ELIZABETH SHIELDS, having standing in her name 1,560*l.* navy 5 per cent. annuities, and 1,400*l.* 4 per cent. annuities, made her will, dated the 9th of December 1817, and, after devising certain real estates, expressed herself as follows:—"I give, unto the nephews and nieces of my late husband, Andrew Shields, 300*l.* stock, 5 per cent. navy annuities, to be divided among them, in equal shares and proportions; I also give unto my cousins, Elizabeth Brown, Charlotte Richardson, and to Thomas Richards, 200*l.* stock each, 5 per cent. navy annuities; I also give to my relations, Jonathan King and Sarah his wife, 200*l.* stock, 5 per cent. navy annuities; and to my relations, David Shore and his brother Samuel, 100*l.* each, of the like stock; I give to John Gibson, Thomas Harley Richardson, Esq., and Charles Hyde, nephews of my late husband, Elizabeth Mason, a niece of my late husband, and to Ann Lucy Beazly and Jane Marks, 100*l.* stock each, of the 4 per cents. I also give, unto my friends, Anselm John Griffiths,

* *Ex relatione.*

Esq., and to his sister Catharine Elizabeth, and, also, to Susannah and Lucy Ashley, 50*l.* stock each, of the like 4 per cents. I also give and bequeath unto my servant, Dorcas Shirley, the dividends and interest of 500*l.* of the like 4 per cent. stock, for her natural life, and, after her decease, I give 50*l.* stock, part thereof, to the Society for Promoting Christian Knowledge, and 50*l.* stock, other part thereof, to the School for Indigent Blind, in St. George's Fields; also 50*l.* stock, other part thereof, unto the Philanthropic Society: and 50*l.* stock, further part thereof, to St. George's Hospital; and 300*l.* stock, residue thereof, I give unto Elizabeth, wife of Allen Williams, of Southwark, and Elizabeth Piercy, of New Brentford, aforesaid, spinster, equally to be divided between them, share and share alike. I constitute and appoint the Rev. George Gibson, of Carlisle House, Lambeth, and executors of this my will, to whom I give 10*l.* sterling each. And all the rest, residue, and remainder of my estate and effects, both real and personal, which I may die seised, possessed of, or in anywise entitled unto, I give, devise, and bequeath the same, and every part thereof, unto the said Elizabeth, the wife of Allen Williams, and Elizabeth Piercy, to hold to them, their several heirs, executors, administrators, and assigns, for ever, in equal shares and proportions, as tenants in common, and not as joint-tenants."

The testatrix made four codicils to her will. The first codicil bore date the 6th of April 1818, and contained the following passages:—"Whereas I have, since the executing of my last will and testament, exchanged my 5 per cent. navy, and 4 per cent. bank of England stocks, into the bank of England long annuities stock; I do, by these presents, declare my will to be, that all legacies in my will shall be paid out of my present stock, (that is to say,) the legacies in the 5 per cents. navy, and 4 per cents., shall be paid by the same amount in the long annuities, 5*l.* per annum for 100*l.* 5 per cents., and 4*l.* per annum for 100*l.* 4 per cents., and in the same proportion for less sums." And, by the same codicil, the testatrix revoked the legacies which she had given to four public charities after the death of her servant, Dorcas Shirley; and she directed that Dorcas Shirley's annuity of 20*l.* should be paid clear of all legacy duty, and immediately from her death, and that all the other legacies should be paid at the end of one year; and the testatrix thereby also gave Dorcas Shirley 10*l.*, and all her clothes and house linen, and also gave 19 guineas each to seven charities then mentioned, and 10*l.* to another charity.

The second codicil was dated the 16th of June 1818, and was as follows:—"I request my executors to give the following sums to my friends: 19 guineas each to Mr Abraham Trimmer, Mrs Hannah Palmer and her sister, Mrs Jackson, Miss Twigg, Miss Elizabeth Norbury, and her sister Mary Ann and John Cook, late of Twickenham; to Wm. Jones, Joseph Shirley, Wm. Hill, Frances Richards, Elizabeth Hitchcock, John Sharp, and widow Swap, the sum of 10*l.* to each; to Elizabeth Chandler and Sarah George, 5*l.* each."

The third codicil was dated the 8th of May 1821, and contained the following clauses:—"I give unto Amelia Shields Boys and Mary Boys, daughters of Thomas and Mary Boys, 50*l.* each of bank long annuities stock, now standing in my name."

The fourth codicil was dated the 14th day of July 1827, and was as

follows:—"memorandum of Mrs Shields to alter her will. The estate left to Charlotte Richardson to go to Samuel Shore Baker, of Turnhamgreen, and 100*l.* bank 5 per cent. annuities; to the children of the late Thomas Richards, of Isleworth, 10*l.* per annum, out of the same stock, to be divided, share and share alike; to my servant Elizabeth Chandler, the sum of 5*l.* a year, for her natural life, out of the same stock: and I direct all my household furniture to be divided between my two servants, Dorcas Shirley and Eliz. Chandler. I give unto the widow of Thos. Richards, of Isleworth, 19*l.* 19*s.*, and to Esther Chandler, 5*l.*"

The testatrix was at the times when she made her will and codicils, and had been for many previous years, totally blind, and she signed her will and codicils by subscribing her mark thereto. She died on the 8th of September 1828, and the persons named, in her will, as her executors, having died in her lifetime, the defendant, Elizabeth Williams, took out letters of administration to her, with the will and codicils annexed.

The bill was filed by Amelia Shields Boys and Mary Boys, against the administratrix and her husband, charging that the testatrix had, at the date of the third codicil, bank long annuities to the amount of 154*l.* *per annum* standing in her name, and that, at her decease, she had standing in her name, like annuities to the amount of 176*l.* *per annum*, and that the last mentioned sum was still standing in her name, or in the names of the defendants: that each of the plaintiffs was entitled, under the bequest made to them by the third codicil, to so much bank long annuities as would be sufficient to yield the sum of 50*l.* *per annum*, and not, as the defendants pretended, to 50*l.* sterling only, to be raised from the said long annuities. The bill prayed for a declaration that the plaintiffs were each entitled, by way of specific bequest, to so much bank long annuities as would yield 50*l.* *per annum*, and that the same might be transferred to them.

The defendants by their answer, said that, when the third codicil was made, the testatrix was not possessed of any stock except 154*l.* per annum long annuities, which was then worth 2,839*l.* sterling, and 200*l.* navy 5 per cents, then worth 217*l.* sterling, and that she was not possessed of or entitled to personal estate equal in amount, (if the third codicil was to be considered as having given 50*l.* per annum long annuities to each of the plaintiffs), to the legacies given by the will and three first codicils: that they had been informed, by Frances Piercy, a female friend of the testatrix, who prepared the third codicil, that the testatrix intended that the plaintiffs should have 50*l.* sterling each, to be raised out of the said long annuities, and that Frances Piercy was instructed by the testatrix accordingly, and intended the third codicil to contain a bequest, to the plaintiffs, of 50*l.* sterling only: and the defendants submitted that the circumstances aforesaid, and the state, amount, and nature of the testatrix's property required that the court should hold that the plaintiffs were entitled, each, to a mere money legacy of 50*l.*

The testatrix's personal estate, at her decease, consisted of the 176*l.* long annuities, of cash to the amount of 160*l.*, and of furniture and other effects, valued at 106*l.*

Frances Piercy deposed that, on the 8th of May 1821, she prepared the third codicil, from verbal directions given to her by the testatrix

had not any professional advice in regard thereto: that on the 8th of May 1821, she called upon the testatrix, who then told her that the Boys's, meaning the father of the plaintiffs and his family, were broken to pieces, and that the plaintiffs were gone out into families: that the witness then observed, to the testatrix, that the property of the wife of Mr Boys, was secured to her, by her father's will; to which the testatrix replied: "very true, but the money is gone to buy rules, (Mr Boys being then in the King's Bench prison,) and I have been to see them, and gave them 5*l.*, but I can not do that every day; but as Mrs Beazley and Mrs Mason are dead, to whom I have given 100*l.* stock, I should like to give one of those 100*l.*, 50*l.* each to the two Boys's," meaning the plaintiffs: that the witness then said to the testatrix: "You are very kind, it is quite a charity, and I will write whatever you wish me:" That the witness, immediately thereupon, wrote the aforesaid codicil; and that she believed, from what the testatrix said to her on the aforesaid occasion, that the testatrix intended to give by the said codicil, the sum of 5*l.* per annum consolidated long annuities between the plaintiffs, and that the witness did not, nor did the testatrix intend, at any time, to give to the plaintiffs, or to either of them, 50*l.* per annum long annuities.

James Fenn, a clerk in the bank of England, deposed that, on the 9th of December 1817, 1,560*l.* navy 5 per cent. annuities, and 1,400*l.* 4 per cent. annuities, were standing in the name of the testatrix, and that there was not, on the said 9th of December 1817, any other sum of bank annuities, or government or bank stock standing in her name: That the sum of 154*l.* per annum long annuities was standing in the Testatrix's name upon the 8th of May 1821, and that she had not then any other sum of bank annuities or government or bank stock standing in her name: That on the 8th of September 1828, the sum of 176*l.* per annum long annuities, was standing in her name, and that there was not, on the same day, any other sum of government or bank annuities, or any other shares or share, or interest in long annuities standing in her name: That, on the 9th of December 1817, the value of 1,560*l.* navy 5 per cent. annuities, according to the current market price of that day, was 1,698*l.* 9*s.*, and that on the same day, the value of 1,400*l.* 4 per cent. annuities, according to the current market price of that day, was 1,391*l.* 5*s.*; and that on the 8th of May 1821, the value of 154*l.* per annum long annuities, according to the current market price of that day, was 2,887*l.* 10*s.*; and that on the 18th of December 1828, the value of 176*l.* per annum long annuities, according to the current market price of that day, was 3,542*l.*

Mr Pepys and Mr Kindersley, for the plaintiffs, contended that the bequests in the third codicil, were specific legacies of 50*l.* long annuities: that the evidence which the defendants had entered into, for the purpose of putting a different construction on the bequest, was inadmissible: and that the only purpose for which the evidence was admissible, was to show that the testatrix had 154*l.* long annuities at the date of the third codicil. The Attorney-General *v.* Grote, 3 Mer. 316,* Stafford *v.* Horton, 1 Bro. C. C. 482.

* The decision of the *Master of the Rolls* in this case, was reversed by Lord Eldon. His lordship's judgment was delivered, with the consent of all parties, after he had resigned the great seal. It will be reported by Messrs Russell & Mylne.

[Boys *v.* Williams.]

The Solicitor-General, Mr Knight, and Mr G. Richards, for the defendants:

The evidence in this case, is of two sorts: one tends to show the state of the testatrix's property, at the dates of her will and codicil; and the other, to prove declarations made by the testatrix. We admit that the latter is not admissible, but the former is receivable. Where there is an inaccuracy on the face of a will, and the thing does not exist as it is given, parol evidence may be adduced in order to remove the ambiguity. There is nothing that answers the description of bank long annuities stock; and, therefore, in order to discover what the testatrix meant by those words, we must inquire what she was possessed of. independently of that, in putting a construction on a will, the court has a right to inquire what the testator's property was, in order that it may be placed in the situation of the testator, and may have the same knowledge as he had: Selwood *v.* Mildmay, 7 Ves. 306. In the Attorney-General *v.* Grote, the will contained legacies of certain sums, *per annum*, bank long annuties; and, as the words "*per annum*" were introduced, the *Master of the Rolls* decided, on the whole contents of the will, that the bequests were specific. Here the words "per annum" do not occur; therefore the Attorney-General *v.* Grote is no authority in this case. In Fonnereau *v.* Poyntz, 1 Bro. C. C. 472, Lord Thurlow, though he was first of a contrary opinion, ultimately decided that parol evidence of the state of the testatrix's property, was admissible. If the evidence was admitted in Fonnereau *v.* Poyntz, *á fortiori*, it ought to be admitted in this case. The words, in that case, were much clearer than they are in this. There is a very material distinction between the expressions in the will and the expressions in the codicil. If the codicil had been the only instrument, and the words of it had been clear, the evidence could not have been received. But this testatrix, when she means to bequeath stock, in her will, employs very different words from those which she uses in the third codicil. Besides, the testatrix, in her bequest to the plaintiffs, does not use the words "*per annum*;" in other instances, where she means to give stock, she adds those words. The words used here are, "50*l.* of bank long annuities stock," which we say means 50*l. out of* the testatrix's bank long annuities. This bequest is ambiguous: and, therefore, the court has a right to know what the state of the testatrix's property was, and may then put such a construction on the bequest, as the words will bear. The last case on this subject is Colpoys *v.* Colpoys, Jac. 451. In the present case, if it is held that the bequests to the plaintiffs are specific bequests of 50*l.* long annuities, the assets will be sufficient, by upwards of 1,500*l.* to pay the legacies. At the date of the third codicil, two of the legatees had died, and the testatrix had then about 100*l.* undisposed of in money; and the testatrix meant to give, to the plaintiffs, the exact amount of the money that then remained at her disposal. The legacies in question are demonstrative legacies: they are not bequests of the actual stock standing in the testatrix's name, but the sums of money to be paid out of that stock. The plaintiffs were persons in distressed circumstances, and the legacies were given to them, out of mere charity. It is clearly established, by the cases that have been cited, that, where there is, as in this case, an inaccurate or ambiguous description of the subject of the gift, the court may inquire into the

nature of the property which the testatrix was possessed of, and may then give a rational construction to the words of the will, according to the actual state of the fund; for the court is then possessed of the same knowledge as the testatrix had. Lowe v. Lord Huntingtower, 4 Russ. 532, note.*

The Vice-Chancellor. The question before me is, whether there is so much difficulty in construing the expressions which this testatrix has used, as to authorize the admission of evidence as to the state of her assets. Before I can hear the evidence, I must be satisfied that the ambiguity exists. I entertain, however, no doubt about the meaning of the words used in the bequest to the plaintiffs. Notwithstanding the deficiency of the fund, the testatrix has used words which, to my mind, clearly import that each of these legatees was to have 50*l.* long annuities.

In Fonnereau v. Poyntz there was a singular use of the word "interest." In the Attorney-General v. Grote, the legacies were given in terms which varied as between themselves; and no question arose about the receipt of evidence: for that cause was heard upon bill and answer, and the question was raised upon the answer: and, notwithstanding the deficiency of the fund, the court held that the legacies were all legacies of long annuities. There is not so much foundation for a doubt in this case, as there was in the Attorney-General v. Grote. I do not mean to over-rule the case of Fonnereau v. Poyntz; but that case was decided upon all the words taken together, and upon the particular words used in the will. In this case I have no doubt about the meaning of the words; and, therefore, I think that I am not at liberty to look at the state of the testatrix's assets. But I go further than that, and say that, if I were at liberty to look at the state of the testatrix's property, I must hold that she intended to give, to the plaintiffs legacies of 50*l.* long annuities.

"This court doth declare that the evidence taken in this cause, is not admissible to explain the intention of Elizabeth Shields, deceased, the testatrix in the pleadings of this cause named, with respect to the legacies given, to the plaintiffs, by the third codicil to the will of the said testatrix: and this court doth declare that, according to the true construction of the third codicil to the said testatrix's will, each of the plaintiffs is entitled to a legacy of 50*l.* per annum long annuities, as a specific legacy: and it is ordered and decreed that it be referred, to the Master of the court in rotation, to inquire and state to this court what long annuities were standing, in the name of the said testatrix, in the books of the governor and company of the Bank of England, at the respective dates of the first and third codicils to her will, and at her death; and whether she has given any, and, if any, what specific legacies affecting the same, besides the said legacies to the said plaintiffs: and it is ordered that the said Master do take an account of the personal estate of the said testatrix, not specifically bequeathed, come to the hands of the defendants, Allen Williams and Elizabeth his wife, &c."

* See also the judgment of Tindal, C. J. in Miller v. Travers, 8 Bing. 244.

# ENGLISH

# CASES IN CHANCERY.

## BEFORE SIR JOHN LEACH, MASTER OF THE ROLLS.

### Charles Fordham and Wm. Fordham, plaintiffs; and Isaac Rolfe and Myrinda Codling, defendants.

1 *Tamlyn*, 1.

A., by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration *cum test. annexo* must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended. *Westminster Hall*, June 23, 1829.

WILLIAM PRATT, by his will dated 5th September 1818, directed that all his just debts, and funeral and testamentary expenses, should be fully paid and satisfied out of his personal estate and effects, if the same were sufficient for that purpose; but if not, then the deficiency to be made up out of his real estate thereinafter devised. And subject thereto, he gave and devised unto his wife Susannah and her assigns, several copyhold messuages, to hold unto his said wife and her assigns for and during the term of her natural life, provided she should so long continue his widow and unmarried, and subject to the mortgages and other incumbrances thereon, with remainder to the defendant, Myrinda Codling, her heirs and assigns for ever. The testator appointed his wife, Susannah, and defendant, Isaac Rolfe, executors. The testator and his widow are both dead. This bill was filed by the plaintiffs as the judgment creditors of William Pratt, deceased, on behalf of themselves and his other creditors. The bill stated the preceding facts, and that the executors had not proved the will; but that the personal property being under *5l.*, Susannah Pratt had exhibited the will in the court of the archdeaconry of Sudbury, in order to be filed and registered, and the same was filed and registered accordingly, and that the defendant Rolfe had possessed some personal estate and effects of the

[Fordham *v.* Rolfe.]

testator. The bill prayed that an account might be taken of what was due and owing to the plaintiff and the other creditors of the testator, and that all the debts might be paid and satisfied out of the said copyhold premises, and that the said copyhold premises might be sold for that purpose. The only defendants were Myrinda Codling and Isaac Rolfe; the heir at law was not a party.

Mr Lovat for the plaintiffs. The testator having left no personal estate, the executors refused to prove the will, and no other person would administer. The heir at law is an infant, but not a party, nor is it necessary he should be. He submitted that the decree should be for an account of the debts, and for sale of the copyholds.

The Master of the Rolls. I can not do that. Why do you not take out administration? The account of the personal estate must be first taken, in order to show there is a deficiency of personal assets, and for that purpose an administration, with the will annexed, must be obtained. The heir at law must be a party. The will can not be decreed to be well proved in his absence. Let it stand over, with leave to make the administrator and heir parties.

*Note.*—It is always desirable to have the will declared to have been well proved, and that can only be attained, by the heir at law being a party to the bill.

In a case of possession by the devisee for several years, Sir Joseph Jekyll, Master of the Rolls, is said to have decreed a sale without the heir at law being a party (Harris *v.* Ingledew, 3 P. W. 92;) and Mr Cox, in a note, adds, that it appears by the register's books, that the will of the testator was declared to be well proved; but the learned judge himself said in that very case, "that the objection of the heir at law not being a party, seemed to be a material objection; for since the sale of the estate must affect all the devisees in proportion, and as the estate would not, without the heir being a party to the decree, sell for near the value, this might be a wrong to all the devisees, and occasion more of their lands to be sold than would perhaps be otherwise necessary."

By a report in Brown, of the case of Williams *v.* Whinyates (2 B. C. C. 399,) where the heir at law was in the East Indies, it is said that the Lord Chancellor declared the will to be well proved. This, however, could not bind the heir at law, he not being a party to the suit, nor insure the title under it against his claims. In Thompson *v.* Topham, (1 Yo. & Jer. 556,) in the exchequer, to which the heir at law was not a party, by reason of his being out of the jurisdiction, the court merely decreed the trusts of the will to be carried into execution. Indeed, the counsel in that case did not even ask for a declaration that the will was well proved, as it would be contrary to practice, and if inserted, would not bind persons absent (Ld. Redesdale, 139, 140., 3d ed.,) but it is not a good exception to a report of good title that the heir at law was not a party (Wakeman *v.* Dutchess of Rutland, 5 Ves. jun. 232.)

The heir at law should be made defendant, and not co-plaintiff, when any deed, will, &c. is to be proved against him (Plunket *v.* Joice, 2 Sch. & Lef. 159.)

## In the matter of Henrietta Moody, an infant.

1 *Tamlyn*, 4.

A. CONTRACTED to sell a freehold estate to B., and by his will gave the purchase-money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust, to sell the same, and apply the purchase-money to the like purposes. A. died, leaving a son, his heir-at-law, who died, leaving an only daughter, his heiress-at-law, an infant. The court held, that she was not a trustee within the act 6 G. 4, c. 74, and dismissed a petition that the infant might be ordered to convey.

*Westminster Hall*, June 22, 1829.

## James Woolley and others, on behalf of themselves and all other the creditors of Charles Perks, deceased, plaintiffs; and John Gordon, Isaac Newton, and several others, defendants.

1 *Tamlyn*, 11.

Although a decree direct that all accounts be taken, the Master will not take the accounts of a partnership, unless especially directed so to do.

*Westminster Hall*, June 26, 1829.

THIS was a petition by the defendant, Isaac Newton, and stated, that in the year 1806, the testator proposed that the petitioner should commence business with him in the trade or business of buckle manufacturers, and they were to be equally interested in the profits. Charles Perks died in July 1819, having previously made his will bearing date the 20th July 1816, but he did not thereby appoint any executor, and administration, with the will annexed, was granted to defendant Gordon. In the month of June 1820, the bill in this suit was filed, praying the usual accounts of personal estate, and that the freehold estates of the testator might, as well by force of the provisions of the will as by the statute, be declared assets to be administered by this court in payment of the testator's debts, whether simple contract or specialty; and for marshalling the assets, the usual decree followed. And the petition further stated, that the testator was cashier of the partnership; and that upon investigating the accounts, upwards of 5000*l.* appeared to be due to the petitioner on account of the partnership; and that the petitioner had carried in a charge before the Master, as well for that sum as for a further sum of 300*l.* for goods sold and delivered by him to the testator; but the Master refused to allow the claim, on the ground that he was not *directed by the decree to inquire into the fact, whether the petitioner was or was not a partner with the testator, or to take an account of any such partnership*. The petitioner further stated, that the

partnership accounts could not be taken under the decree. It was prayed his Honour would order and decree, that the accounts of the partnership might be taken by the Master. This petition was supported by affidavits of the facts therein stated, and it appeared by the affidavits and admissions in the arguments, that this cause had, in its early stages, been conducted by the same solicitors for all parties. And the petitioner complained that his claim had been disallowed by an apparent assent on his part which he never authorized.

Mr Bickersteth and Mr K. Parker in support of the petition. The petitioner was entirely ignorant of what had been going on in the master's office; and the only question is, whether there has been such *laches* on the part of the petitioner as will affect him? There can be no doubt that he was a partner with the testator up to the time of his death.

Mr Pepys and Mr Hindes, against the petition.

The Master of the Rolls. The answer of this petitioner, with that of many other defendants in this suit, was put in without oath. Is it possible to conclude a person under the circumstances of this case? It is a misfortune flowing from the same solicitor being employed by all parties. I will not conclude him, who has been very ill treated. The Masters have made a rule not to take an account of a partnership unless they are particularly directed to take the partnership accounts. Yet they are hardly warranted in making that rule, the order being to take all accounts.

Let it be referred to the Master to enquire whether at any time and when the petitioner was a partner with the testator; and if he shall find him to have been a partner, then to take the accounts of the partnership; the accounts to be confined to the business of buckle-making, the petitioner to pay the costs of the petition, and to take the inquiry at his own expense.

## Simon and others *v.* Barber and others.

1 *Tamlyn*, 14.

A. by each of two several codicils to his will, directed his just debts to be paid, and, in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other he gave 200*l.* to the same charity: Held that the legacies were not accumulative, and that the latter legacy was only a substitution of the former.

The charitable object having failed, the court will not apply the funds. Where a charitable object fails, from whatever cause, the crown has a right to interfere. The crown must signify the charitable purpose the fund shall be applied to.

*Westminster Hall*, June 22, 1829.

THIS was the petition of three infants, defendants in this suit.

The testator, Edward Simon, made a will on the 16th day of De-

cember 1789, and seven several codicils and testamentary papers thereto. By his fifth codicil, dated 27th May 1805, he makes the following bequest: "My just debts to be paid, as may appear by my book, particularly one of about 12*l.* to one Tostevin of Guernsey, who had sent me a power of attorney to receive wages due to him from a man of war. I also wish that out of the first money that may be received from the stocks, that 50*l.* may be bought in my name in the 3 per cent. consols. I also request that 100*l.* stock 3 per cent. consols may be transferred into the name of the trustees of the hospital at Guernsey; and also the same to be transferred in the name of the trustees of the hospital at Jersey." The sixth of the said codicils, bearing date the 5th day of June 1805, was in the following words: "My just debts to be paid, as may be claimed, or as may appear by my book, particularly one of about 12*l.* to one Tostevin of Guernsey, who had sent me a power of attorney to receive some wages due from a man of war. I also give and bequeath unto the treasurer, governor, or directors of the Guernsey hospital for the time being the sum of 200*l.* stock 3 per cent. bank annuities, to be applied towards carrying on the charitable designs of the said corporation. I also give and bequeath unto my nephew George Le Bontillier 1500*l.* stock 3 per cent. bank annuities, over and above the 500*l.* already bequeathed to him in my will or testament now in the hands or possession of my daughter Elizabeth Simon, making together the sum of 2000*l.* stock, hoping thereby that he will exert himself in getting in my debts and settling my accounts as they should be."

By an order bearing date the 6th July 1822, after directing the sale of some stock, it was ordered that out of the money to arise from such sale, the sum of 300*l.* should be carried over in trust in this cause, "The account of the Guernsey Hospital," and should be laid out in the purchase of bank 3 per cent. annuities, in the name and with the privity of the accountant-general in trust in this cause, "the like account." And it was ordered that the dividends of the bank annuties to be purchased with the said sum of 300*l.* should be laid out in the purchase of like annuities, in the name of the said accountant-general in trust in this cause, "The account of the Guernsey Hospital." The Master reported, on the 11th March 1828, that it had been stated to him, and verified by affidavit, that at the respective times of making the said codicils, and of the death of the said testator, there were two hospitals in the said island of Guernsey, one of which was situated in and supported by the town and parish of St. Peter's Port, and in which the poor of the said town and parish were placed, and was known by the name of "the town hospital;" and the other of such hospitals was situate in the parish of St. Mary de Castro, in which the poor of that and the adjoining parishes were placed, being supported by them, and known by the name of "the country hospital." And further, that the said two hospitals had ever since continued, and were still in existence, and were only hospitals which existed at the respective times of making the codicils, or which then existed in the said island of Guernsey. The master reported that he did not find that was any establishment in the said island of Guernsey answering the description of the Guernsey hospital.

A further reference was afterwards made to the Master, to inquire

and state to the court whether any and what particular hospital was meant or intended by the said testator by the description in his will, in the pleadings stated; and the Master thereupon reported that he did not find that any particular hospital in the said island of Guernsey was meant or intended by the said testator Edward Simon, by the description in the codicil to his will, and that report was absolutely confirmed.

Mr Roupell for the petitioners, plaintiffs. The first question on these testamentary papers in respect of the legacy to the Guernsey hospital is, whether the testator meant to give two legacies? namely, the legacy of 100*l.* by the fifth codicil, and 200*l.* by the sixth codicil, by way of accumulation, or whether the latter legacy was not meant in substitution of the former. Looking at those codicils altogether, it is clear that the testator meant only to give 200*l.* in the whole; there are several circumstances in these codicils that tend to show this to have been the testator's intention, and in particular that both the fifth and sixth codicils commence by providing for his just debts, and the payment of 12*l.* to one Tostevin of Guernsey. The second question was, what was to become of this legacy, there being no particular hospital called the Guernsey hospital? Did it not fall into the residue for want of a proper object?

Mr Wray for the Attorney-General, who had been served with the petition, submitted to the court that these sums were accumulative, and cited the case of Hurst and Another *v.* Beach and Others, 5 Mad. 358, heard before his Honour, when Vice-Chancellor, when he said, "Where a testator leaves two testamentary instruments, and in both has given a legacy, *simpliciter*, to the same person, the court considering that he who has twice given must, *primâ facie*, be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less or larger than the first."

The Master of the Rolls. There are circumstances sufficient to show that the sum given by the sixth codicil was not meant by the testator to be accumulative, but in substitution of that given by the fifth codicil: there being no hospital called "The Guernsey Hospital," the particular charitable object of the testator has failed: this court can give no direction for the application of the fund, but it remains with the crown to signify to what charitable purposes this fund shall be applied. Whenever a charitable object fails, from whatever cause, the crown has a right to interfere.

## Bass *v.* Russell, wife, and others.

1 *Tamlyn*, 18.

A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minorities; and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children, in like manner as his other effects, and

[Bass *v.* Russell.]

subject thereto, he bequeathed his leasehold and personalty unto his three children, and the survivors and survivor of them. One of them died under twenty-one: Held, that he took a vested interest at the time of the death of the testator.

*Westminster Hall*, July 10, 1829.

EDWARD HAWTHORN by his will, dated the 31st July 1816, gave and bequeathed his leasehold houses, and all other his personal estate and effects, unto his executors, upon trust, out of the rents, interest, and annual proceeds thereof, to pay unto his wife Elizabeth the sum of 300*l.* per annum, and the sum of 100*l.* per annum for each of his children, which was to be paid to her during their respective minorities, for their support and maintenance; and from and after the decease or marriage of his said wife, then the said sum of 300*l.* was to go and be divided amongst his children, in like manner as the other part of his estate and effects was thereinafter by him given to them, and thereinafter mentioned; and, subject as aforesaid, he gave and bequeathed his said leasehold houses, and all other his personal estate and effects, unto his three children, Harriet Hawthorn, Margaret Hawthorn, and Edward Hawthorn, meaning Edward B. Thomas Hawthorn, and the survivors and survivor of them, share and share alike: and he declared it to be his will, that the provision thereby made to his daughters was for their sole use, independent of any husbands they might marry. And he appointed his wife, and Wm. Barron, Esquire, and James Thomas, executors, who duly proved the will.

Elizabeth Hawthorn, the widow, died.

E. B. T. Hawthorn, having survived the testator, died in the year 1824, under the age of twenty-one years, unmarried and intestate, leaving his sisters of the whole blood, Harriet and Margaret, him surviving; and the plaintiff and the defendant Sarah Russell, his brother and sister of the half blood, his only next of kin, him surviving.

Letters of administration to the effects of the intestate were granted to Sarah Russell, with the assent of the defendant George Russell, her husband.

The plaintiff's bill charged, that the intestate, upon the death of the testator, became entitled to a vested interest in the one third part of such residuary estate, and which, upon the death of the intestate, became divisible amongst his next of kin. The case made by the answers of the sisters of the whole blood was, that, on the death of the intestate, his one third of the residuary personal estate devolved to and became divisible between them.

Mr Roupell and Mr Pemberton for the plaintiff. There is nothing in this will to postpone the vesting beyond the time of the death of the testator. By the last clause of the will, two of the children, being daughters, were to have their shares for their separate use; and it is inconsistent with that provision that the vesting should be postponed.

Mr Pepys and Mr Elliston for the two sisters of the whole blood. The testator having provided for the three children during their minorities, he gave his property to his children, and the survivors and survivor of them; that is to say, those who should be then in existence

after their minorities had passed, thereby postponing the vesting until the children should attain twenty-one. They cited Russell *v.* Long, 4 Ves. 551; Mendes *v.* Mendes, 3 Atk. 619; and see Roebuck *v.* Dean, 2 Ves. jun. 265.

Mr Jemmett, for another defendant, cited Cuffs *v.* Woolcott, 4 Madd. 11.

The MASTER OF THE ROLLS. This is a gift that must necessarily take effect at the death of the testator; and the words, survivors and survivors of them, must be referred to the time at which they are to take—the death of the testator.

Declare that the intestate E. B. T. Hawthorn took a vested interest in one third part or share of the residuary estate of the testator.

## Capper *v.* Spottiswoode and others, assignees.

3 *Tamlyn*, 21.

A vendor, who has taken, as a security for part of the purchase-money, the bond of the vendees and a mortgage of part of the property sold, can not, on the bankruptcy of the vendees, establish a lien on the entire estate.

*Westminster Hall*, July 10, 1829.

THE plaintiff sold to Thomas Hurst, John Hurst, and Joseph Ogle Robinson, the fee-simple of lands in Yorkshire for 34,000*l*, and conveyed the same accordingly by indentures of lease and release, bearing date 18th and 19th of July 1825.

Only 12,000*l*. of the purchase-money was paid; the remainder was secured by the bond of the purchasers, dated 20th July 1825, and a reconveyance, dated 19th and 20th of July 1825, of certain parts of the purchased property by way of mortgage.

The purchasers afterwards became bankrupt, and the plaintiff alleged, that the part of the lands in mortgage were an inadequate security; and the short point in this case was, whether the plaintiff was entitled to a lien on the whole estate.

The MASTER OF THE ROLLS decided that he was not entitled to it.

## Simon et ux. and others *v.* Barber and others.

1 *Tamlyn*, 22.

The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the Master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the court refused

[Simon et ux. and others *v.* Barber and others.]

to make any reference to the Master with respect to the maintenance of the infants in the time passed, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them.

*Westminster Hall*, June 22, 1829.

THIS was the petition of Robert Dodgson, one of the plaintiffs, setting forth an order, bearing date the 26th of July 1822, whereby it was declared that Elizabeth Dodgson, the deceased wife of the petitioner, was entitled for life to the interest of a moiety of 2,000*l.* and of the clear residue of the testator's estate; and that her issue would become entitled to the capital thereof on her death; and that 2,000*l.* should be carried to the account of the plaintiff, Elizabeth Dodgson, to be laid out, and the same was laid out in the purchase of 2,523*l.* 13*s.* 3*d.* 3 per cent. bank annuities. There were other residuary funds. Elizabeth Dodgson died in April 1823, leaving three children, who were defendants to the suit, and on her death became entitled. The dividends had been laid out in the purchase of stock.

The petitioner stated circumstances of inability to continue to maintain and educate his children, and that he had been at a great expense in educating and maintaining them since the death of his wife. The prayer was for a reference to the Master, to inquire into the petitioner's ability to maintain and educate the children; and if the Master should find that the petitioner had not been of ability since the year 1825, then that the Master should inquire and report who had maintained and educated them; and what had been properly expended or ought to be allowed on that account; and out of what funds or fund the same ought to be paid. And in case the Master should find the petitioner not to be now of ability to maintain and educate his said infant children, then that he should consider and report what would be proper to allow for their future maintenance and education, regard being had to their fortune and circumstances, and also out of what funds.

Mr Roupell for the petitioner.
Mr Richards for the infants.

The MASTER OF THE ROLLS. It is not usual to make any reference on the subject of maintenance retrospectively. Take the order with respect to future maintenance.

## Saint John *v.* Champney, Bart. and others. Same *v.* Stirling, Bart. and Dance.

1 *Tamlyn*, 23.

THE court refused to allow a petition to be amended by substituting another person for the petitioners, who, on the hearing of the petition, appeared to have no title.

*Westminster Hall*, June 26, 1829.

## Between William Monk and Esther his wife, William Hutchinson and Ann his wife, plaintiffs; and Peter Mawdsley and Archibald Keightley, defendants.

1 *Tamlyn*, 24.

A., a married woman, having, by virtue of her marriage-settlement, power to appoint her personalty and a freehold to such person as she should direct, with remainder to a trustee to sell, and distribute amongst her next of kin, gave, devised, and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and all she might die possessed of at the time of her death, after certain previous bequests and her just debts were discharged, and appointed him and another executors: Held, that the husband took only an estate for life, and that the next of kin were entitled to the moneys to arise by a sale of the reversion.

*Westminster Hall*, June 23, 1829.

ARABELLA MAWDSLEY, by her marriage settlement with Peter Mawdsley, conveyed and assured a messuage, land, and hereditaments in Great Neston, of which she was seised in fee- imple, unto and to the use of the defendant Archibald Keightley, his heirs and assigns, and assigned unto him, his executors, administrators, and assigns, certain leasehold premises, and also all her bonds and other securities for money; and also all and singular her household goods, plate, linen, china, and furniture, and all other her personal estate and effects. Then follow trusts for the separate use of the settlor during her life; and as to the freehold messuage, land, and premises, from and after her decease, to the use of such person and persons, and for such estate and estates, uses, ends, intents, and purposes as she, notwithstanding her intended coverture, and whether she should be sole or covert, by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her signed, sealed, and published in the presence of two or more credible witnesses, should appoint; and in default of such appointment, to the sole and absolute use of Archibald Keightley, his heirs and assigns for ever, upon trust to sell the same; and as to the money to arise from such sale or sales, upon trust to pay, distribute, and divide the same unto and equally amongst such of her children as therein mentioned; but if there should be no children or child of the said Arabella, then upon trust to distribute the same in a due course of administration amongst her next of kin, in such manner as her personal estate would be distributable if she should happen to die a *feme sole*, and should not make any testamentary disposition of her personal estate. Arabella Mawdsley died without children, having made her will in writing bearing date 20th April 1824, and executed by her in the presence of and attested by three credible witnesses in the words or to the effect following: "In the name of God. Amen. I, Arabella Mawdsley, wife of Peter Mawdsley of Moorside, in the county of Chester, do make this my last will and testament in manner and form following, having full disposing power by settlement made at my marriage with the above Peter Mawdsley,

now in the hands of Mr A. Keightley, senior, solicitor, Liverpool, and my trustee." The testatrix gave several legacies; and the will then proceeds thus: "I give, bequeath, and devise to my husband Peter Mawdsley my two fields and house in the township of Great Neston; likewise the remainder of my personalty, and all I may die possessed of at the time of my death, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving this my last will and testament. I nominate and appoint Mr A. Keightley and my husband Peter Mawdsley trustees and executors of this my last will and testament, revoking all other wills made by me at any time."

The testatrix died on the 24th May 1824, leaving the plaintiffs Esther and Ann, her only sisters, and only next of kin, and soon after her death the defendants, Archibald Keightley and Peter Mawdsley, proved her will. Ann married the plaintiff Hutchinson.

The bill stated the preceding facts, and that Peter Mawdsley claimed to be entitled in equity to the fee-simple of the messuage, lands, and premises devised to him by the will; but the plaintiffs submitted that he was only entitled to a life-estate therein, and that plaintiffs Esther and Ann, as the next of kin of Arabella Mawdsley, were entitled to have the house, land, and premises sold (subject to the life-estate of Peter Mawdsley therein), and to have the proceeds arising from such sale distributed between them, according to the directions of the indenture of settlement; and prayed that the defendant, Archibald Keightley, might be decreed to sell the reversion of the messuage, land, and premises, expectant of the life-estate of Peter Mawdsley therein, and to distribute the proceeds arising therefrom amongst and between the plaintiffs, according to the directions contained in the indenture of settlement.

The defendant, Peter Mawdsley, by his answer, said he had been advised by two eminent barristers at law, that according to the construction of the will he was entitled in fee-simple to the messuage, lands, and premises devised and appointed to him by the will; and that according to the true construction of the will or testamentary appointment, the whole of the real and personal estate of or to which the testatrix was possessed or entitled was thereby devised and bequeathed, and that she did not die intestate as to any part thereof, and that, therefore, the plaintiffs were not in any manner interested therein; and the defendant insisted that according to the true construction of the will and testamentary appointment, he was entitled to the fee-simple of and in the messuage, lands, and premises devised or appointed to him by the will, as in the bill mentioned, and that the complainants, as the next of kin of Arabella Mawdsley, were not entitled to have the said messuage, lands, and premises sold, subject to his life-estate therein, or to have the proceeds arising from such sale divided between them, according to the directions of the indenture of settlement.

The plaintiff, Esther Monk, having died, and Charles Monk having obtained letters of administration to her effects, the bill was revived by him.

This case was argued before Sir John Leach, when Vice-Chancellor, on demurrer, on the 30th April 1827, and he then decided that the husband took a life-estate only in the realty.

Mr Bickersteth, for the plaintiffs.

[Monk *v.* Mawdsley.]

Mr Preston, for the defendants. The authorities are very nice upon this subject; and we do not argue it, only because the principal point has already been decided by your Honour upon demurrer, 1 Simon, 286.

The MASTER OF THE ROLLS declared that the husband took an estate for life in the two fields and house in Great Neston, and decreed that the trustee proceed to a sale of the reversion, and receive the purchase-money, and thereout pay the expenses of the sale, and the costs of all parties to this suit; and then pay one moiety of the clear residue to Charles Monk, as administrator of Esther Monk; and the other moiety into the bank, with the privity of the Accountant-General, to the account of William Hutchinson and Ann his wife, subject to the further order of the court, with liberty to apply.

*Note.*—As to the effect of the words, "All I may die possessed of," see Pitman and another *v.* Stevens, Newte and others, 15 East, 505., and the cases collected in 2 Prest. on Est. 173, 174. Amongst the cases that have been cited in the course of this suit are *Denn dem.* Moore *v.* Mellor, 5 T. R. 558.; Doe *v.* Ramsbottom, and Roe *v.* Daw, 3 M. and S. 516. & 518.; Smith *v.* Coffin, 2 H. Bl. 444.; Barnes *v.* Patch, 8 Ves. 604.; Cooke *v.* Ferrand, 7 Taunt. 122.; Goodtitle *v.* Maddern, 4 East, 496.

## Purdie *v.* Millett and others.

1 *Tamlyn*, 28.

A. having deposited leases with B. to secure moneys borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration.

On a bill to redeem, and that the agreement should stand only as a security: Held, that the plaintiff was not entitled to relief in equity, and bill dismissed.

*Westminster Hall*, July 6, 1829.

IN the years 1805 and 1806, William Millett deceased, the defendant's testator, lent to plaintiff 213*l.*, and plaintiff deposited with him a lease for twenty-one years from 1797, of five houses, which produced a net rental of 84*l.* On a further advance of 62*l.*, making with the former loan 275*l.*, the plaintiff deposited with him an agreement in writing for a lease for twenty-one years, from *Christmas* 1810, of five other houses, which produced the further clear rent of 36*l.* In *June* 1813, there was a further advance of 72*l.* on a promissory note and in *August* the further sum of 44*l.* on a promissory note; and at the time of each of these advances, the plaintiff agreed that the sums advanced should be secured by the deposit of the lease and agreement.

The deceased entered into the receipt of the rents in 1813. The lease of the more valuable part of the property expired in 1818.

There were various charges in the bill, to impugn an agreement for the equity of redemption of the property set up by the defendants, and the bill prayed that the agreement might be declared void or stand only

as security; that the accounts might be taken; and that the plaintiff might redeem.

The defendants by their answer set forth an account and some promissory notes, found amongst the papers of the testator; and also an agreement, in writing, signed by the plaintiff, and which was in the words and figures following;—viz.

*London*, 18th *February* 1815.

"Memorandum.—I, the undersigned, Richard Purdie, in consideration of moneys due from me to Mr William Millett, of Burdett Place, in the Kent Road, in the country of Surrey, gentleman, do hereby agree to give up all my interest in my ten houses, situate in Kingsland Road, Shoreditch; and of which houses the said William Millett is now in receipt of the rents.

"Richard Purdie."

"Witness, James Pearce,

"13, *Paternoster Row*."

And defendants said they believed that the deceased became entitled to the premises by the said purchase; and they admitted it to be true, that the rents and moneys so received, in case the same had been applied thereto, would long since have been sufficient to pay and satisfy the alleged principal sum of 275*l.* and all interest due thereon; but defendants denied, to the best of their knowledge and belief, that the said rents and moneys ought to be so applied; and defendants believed, that if such sum of 275*l.* and interest were due to the said William Millett, the same were long previously to his death liquidated and discharged by means of such purchase of the said premises, and not by means of the rents and profits received by the said William Millett, as in the bill alleged.

The defendants submitted that the plaintiff was bound to execute an assignment: they denied fraud in obtaining the agreement; denied that 275*l.* was the only consideration; but defendants believed that all the moneys then due from the plaintiff to the deceased were the consideration of the agreement.

There was some slight parol evidence to show that by the agreement security only was intended; but the solicitor of the mortgagee, who drew the agreement, and who was present at its execution, denied that any thing passed thereat to qualify it; and swore to his belief, that he had no reason for supposing the parties did not understand the purport and effect thereof. There was evidence of the value of the property, and which showed the inadequacy of the consideration.

Mr Pepys and Mr Girdlestone, jun. The object of this bill is to obtain an account, to redeem the interest remaining in the leaseholds, and to make void an agreement set up by the defendants, for giving up the equity of redemption. At the time it is pretended that this agreement was executed, there was about 100*l.* per annum applicable to the payment of the principal, and only 200*l.* then remained due; yet by this agreement the plaintiff simply, and for nothing, releases his equity of redemption. The plaintiff was receiving parochial relief, and the agreement was prepared by a person employed by the mortgagee.

Fraud was originally intended, and a fradulent use has been made of the agreement.

Mr Norton, for the defendant.

The MASTER OF THE ROLLS could not discover any principle upon which the court could give the relief prayed by the bill. The consideration was not adequate to the value of the property, but the court would not on that ground set aside this agreement. It was also proved that the plaintiff was in distress; but no advantage was taken of that circumstance, for no money was advanced at the time of signing the agreement: the paper was remarkably short; and the terms were so simple and explicit, that the plaintiff could not have misunderstood them. The agreement was unnecessary as a mortgage security, for the mortgagee had already a deposit of the leases, and was in receipt of the rents. The case was one in which the court could not interfere.

Bill dismissed with costs.

**Between James Richard Denyer and others, and Charles Denyer Wright and others, Infants, by their next friend, plaintiffs; and Charles Druce the elder and others; the Mayor, Commonalty, and Citizens of the City of London; the Chancellor, Masters, and Scholars of the University of Oxford; and Sir John Singleton Copley, Knt. His Majesty's Attorney-General, Defendants.**

1 *Tamlyn*, 32.

A., by her will, gave 7000*l.* to the governors of Christ's hospital, upon trust, for certain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of Christ's hospital.

In case the governors refused to accept the trust, then the 7000*l.* was given to the trustees of the Rev. William Hetherington's charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purpose of the latter charity.

The testatrix also gave 2000*l.* to the university of Oxford.

The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum.

The university also refused to accept the legacy of 2000*l.*

Held, that whenever a charitable legacy, from whatever cause, fail, the crown has a right to interfere, and that the legacies of 2000*l.* and 40*l.* per annum must be applied to such charitable purposes as the crown shall direct.

Held, that as to the 7000*l.*, a reference be made to the Master to appoint new trustees.

The bill dismissed as against the governors, trustees, and university.

[Denyer *v.* Druce.]

When there is a doubt about the indentity of a legatee, the court will direct an inquiry at the expense of the person requiring it.

*Westminster Hall*, July 6.

## Between Thomas Elworthy, William Elworthy, and Mary Bird, plaintiffs; and William Bird, defendant.

1 *Tamlyn*, 38.

A husband being prosecuted and found guilty at the quarter sessions, of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*, and the court, adverting to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court, that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions that to some extent supported it:

Held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to an agreement entered into by his counsel, but on the defendant to disprove it.

Held, also, that the weight of the evidence being that the defendant did not dissent, a court will conclude a counsel had authority.

Held, that the plaintiffs were entitled to a decree for a specific performance, with costs.

*Westminster Hall*, July 7, 1829.

THE bill stated the marriage of the plaintiff Mary Bird with William Bird, and various acts of ill usage by him, and indictments for assault, in which he was found guilty at the Midsummer quarter sessions 1822, for the county of Somerset, when the justices recommended an accommodation of the disputes between the parties, and an agreement was come to by the counsel on their behalf and by their authority; and that the plaintiff would consent to the court imposing a nominal fine, as follows: "Rex *v.* William Bird: upon a verdict of guilty in this case, a nominal fine was, by consent of prosecutrix, imposed on defendant, 1822, July 18th; it being agreed that a deed of separation shall be executed by Mr and Mrs Bird, and Thomas Elworthy, the father of Mrs Bird, and William Elworthy, her brother, who shall be trustees on her behalf, by which 50*l.* a year for her life, payable quarterly by said Mr Bird, shall be sufficiently secured to Mrs Bird, to commence the 1st day of April 1821; the arrears of which to be paid by said Mr Bird; and also covenants on the part of Mr Bird not to molest Mrs Bird; and also covenants from Thomas Elworthy, the father of Mrs Bird, and William Elworthy the brother, to indemnify the defendant against the debts of Mrs Bird; and that Mr Bird shall not be molested by her. All actions and indictments which have been brought and preferred, and which are still pending, for any matter or thing done or said by Mrs Bird, or either of them, or by their respective relations and servants, or any or either of them, relating to or connected with the conduct either of Mr or Mrs Bird, and all actions now pending against any other per-

sons for criminal conversation with Mrs Bird, shall be discontinued; and that no further actions shall be brought, or proceedings had, for or on account of any thing done, or said, to or by the said Mr or Mrs Bird, or their respective families or servants, up to and including the date of this agreement. Thomas Erskine, counsel for the defendant; C. C. Bompass, counsel for the prosecutrix." The bill further stated, that the substance of the agreement was stated to or in the presence and hearing of the justices, who did not object thereto, but approved of the same, and consented thereto, and sanctioned the same; and in consequence thereof, they sentenced the defendant to a fine of one shilling only, and ordered the trials of the other indictments to be respited.

The bill then stated that the defendant had refused to execute the proper deed, or to pay the arrears, and that the plaintiffs had offered to give him the proper indemnity against the debts of Mary Bird. The prayer was for a specific performance.

The defendant by his answer admitted that the counsel did enter into the agreement mentioned in the bill; but he denied that the agreement was come to with his authority or consent, he having positively refused to authorize his counsel or any other person to consent to the same, or any other agreement; and he submitted that he ought to be permitted to dispute the fact of his having assented to the agreement; and he further submitted, that the agreement ought not to be specifically performed, because on the face of it such agreement was illegal, for divers causes thereon appearing, and was such an agreement as a court of equity ought not specifically to perform; but more particularly because part of the consideration upon which the agreement was alleged to have been entered into was the compromising an indictment then already preferred against him by his wife Mary Bird for a misdemeanor, and suppressing other indictments and actions which had then been brought and preferred, and which were then pending, for matters and things done and said by him and the plaintiff Mary Bird, and by their respective relations and servants, relating to and connected with the conduct of him and the plaintiff Mary Bird, and other actions then pending against persons for criminal conversation with the plaintiff Mary Bird; and further actions which might be brought, or proceedings had, on account of things done or said to or by him the defendant and the plaintiff Mary Bird, and their respective families and servants, and also because the object of such alleged agreement was to effect a separation between him and the plaintiff Mary Bird.

The depositions on the part of the plaintiff proved, that Mr Poole, the defendant's solicitor, on the trial of the indictment, stood on the counsel-table in court, and stated openly and audibly to the court, in allusion to the arrangement, "We agree to it," or words to such or the like effect, and that the defendant was present in the court when the verdict was returned; also when the treaty took place, and when Mr Poole made the statement; that the counsel for the prosecution stated openly in the court the terms of an arrangement, which were, that the defendant William Bird should allow the plaintiff Mary Bird the sum of 50*l.* per annum, and that all pending actions on either side should cease; and that, afterwards, Mr Poole stood upon the counsel-table and said, "Mr Bird (meaning the defendant) accedes to it," or words to

that effect, and that such statement, made by Mr Poole, was made openly and audibly in court; that the defendant William Bird was present in court when the verdict was returned, but whether he was in court when the whole conversation took place the deponent could not state, but the defendant was present in court when his attorney made the statement deposed to; that immediately after the arrangement had been made, the defendant left his seat below the magistrates' bench, and went to the opposite side of the counsel-table, when the chairman addressed him by telling him, that as an arrangement had been come to, the court would only impose a nominal fine upon him, or words to that effect, and pronounced sentence, fining him 1*s*.

And the chairman of the quarter sessions deposed, that the magistrates did believe that a treaty for a compromise was proceeding, and the court waited and suspended its business whilst the same was proceeding; and that Mr Erskine, the defendant's counsel, openly and audibly stated to the court that a compromise or arrangement was agreed to; (that was to say,) as deponent best recollected, that the defendant was to allow his wife 50*l*. a year, but that they were to live separate, and that the defendant agreed to such compromise or arrangement; that the defendant was present in court when the verdict was returned, and whilst the conversation and treaty took place; and when the statement was made by Mr Erskine to the court, and from what passed on that occasion, deponent understood and believed, that the defendant agreed to the compromise or arrangement; that sentence was passed or pronounced upon the defendant by the court, namely, that the defendant should pay a nominal fine, (as deponent best recollected, 1*s*.) and which sentence was passed or pronounced immediately after the statement was so made by Mr Erskine, and that the court approved of and sanctioned the compromise or arrangement; and the same was taken into consideration upon passing or pronouncing the sentence, and that the court made a common order for respiting the trials of some other indictments against the defendant for (as deponent best recollected) assaults, and which order was made in consequence of the compromise or arrangement having been agreed to; but whether such indictments were against other persons besides the defendant William Bird, the deponent did not recollect.

On the part of the defendant, there were depositions by one person who stated himself to have been within hearing of what passed between the defendant and his attorney and counsel at the sessions, when the defendant positively stated that he would not allow his wife any thing; and the attorney himself deposed, that the defendant refused to come into the arrangement; but he could not say whether the agreement was signed by the defendant's counsel with or without the authority, privity, or consent of the defendant, or on his behalf.

Mr Bickersteth and Mr Jacob for the plaintiffs. It is now determined that this is an agreement which the court will carry into execution. A demurrer to this bill has been over-ruled. Elworthy *v.* Bird, 2 Sim. 372. The bench, at the quarter sessions, on the trial of the indictment, recommended a settlement of the disputes and differences between the parties. An arrangement was accordingly made and reduced into

[Elworthy *v.* Bird.]

writing, and signed by counsel, and it is sworn that the defendant was present: we have only to prove that he consented.

The Master of the Rolls. You have not so much to do; for it being proved to have been signed by counsel on both sides, it is for the defendant to disprove it.

Mr Richards for the defendant. The defendant's answer and evidence show that he did refuse to enter into the terms of the compromise: there is evidence showing his positive dissent; and the plaintiff has not been able to read, out of the defendant's answer, any one sentence in support of the agreement.

Mr Knight followed for the defendant. I shall not question what your honour has said with respect to the demurrer. On the demurrer, you, sir, were called upon to decide, whether the court could entertain a suit to execute an agreement grounded on the consideration of a compromise of a misdemeanor; but now, at the hearing, the question is, whether this is an agreement fit to be performed? Will the court interfere when the party has her remedy at law to recover her annuity? The defendant has signed nothing; but his counsel's signature is on the brief. A party trusts his counsel as to the particular cause in which the brief is delivered to him, but does not make him his agent for a purpose foreign to the cause. Agent is the language of the statute of frauds, and an annuity is an hereditament. Now, if an annuity may be charged upon a person by an indorsement of counsel on his brief in the hurry of quarter sessions, he may equally make way with an estate of 4,000*l.* a year. A party trusts his counsel with the management of a particular cause, but not beyond it. But, supposing the agreement of a counsel sufficient to bind a party, it is at least doubtful whether the defendant concurred in this instance. The defendant denies that he did, and the attorney supporting him in that denial, the court will at least grant an issue.

The Master of the Rolls. This is an agreement upon which no adequate remedy can be had at law; it can not, therefore, be sent to law. The prior conduct of the party is out of the question. This agreement concludes the parties, and the only question is, whether the counsel had sufficient authority? In the absence of evidence, a court will conclude that he had authority; for it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides; but after duly considering it, I come to the conclusion that counsel had authority which would bind his client. The defendant, it is true, objected when the arrangement was first proposed; but the question is, did he not afterwards, impressed with the weight of his counsel's reasoning, assent?

His counsel swears that such an arrangement was concluded between the parties, and Mr Bird was present. The chairman, in passing sentence, said, "I impose a nominal fine upon you, because you have entered into the arrangement."

It necessarily follows, that the plaintiff is entitled to a decree for a specific performance, with costs.

[Elworthy *v.* Bird.]

Let a proper deed be prepared, to be settled by the Master according to the agreement.

**Between James Spittal, on behalf of himself and all other the unsatisfied Officers, Seamen, and Crew, if any, engaged on board the ship Royalist, on the voyage hereinafter mentioned, who shall come in &c., plaintiffs; and William Smith, defendant.**

1 *Tamlyn*, 45.

The defendant engaged the plaintiff as second mate of a vessel in the South Sea whale fishery, and the plaintiff was to have a forty-fifth share of the net produce. On the return of the ship, the defendant paid the plaintiff a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. The defendant afterwards discovered that several deductions had been made that were not authorized by the custom of the trade.

Inquiries directed, whether the deductions made were authorized by the custom of the trade.

Held, that the bill having been filed by the plaintiffs on behalf of himself and the others of the crew, and no case for equitable relief having been made as to the others of the crew, the bill, as to them, to be dismissed.

*Westminster Hall*, July 1, 1829.

THE defendant being the owner of the ship Royalist, which he was desirous of sending on a voyage to the South Seas, for the purpose of obtaining a cargo of oil and other articles, in the month of May 1820, engaged the plaintiff as second mate thereof, representing to the plaintiff that he had already engaged a person as first or chief mate thereof; and the plaintiff accordingly, under the belief and assurance that some person would go out with the ship as chief mate thereof, and that the plaintiff, having the remuneration of a second mate, would have to perform the duties of second mate only, accordingly engaged himself as second mate of the said ship for the said voyage. And thereupon it was agreed between the defendant and the plaintiff, that in lieu of wages the plaintiff should, according to the usage and custom of merchants and seaman engaged in the South Sea voyages, be entitled unto and receive one equal forty-fifth part or share of the clear produce of the cargo which should be obtained on such voyage remaining after the deduction of all usual and customary charges, deductions, and allowances. And accordingly certain articles of agreement to that effect, bearing date the 1st May 1820, was prepared by or with the privity of the defendant, and were entered into and signed in London as well by or on the behalf of the defendant as by the plaintiff, and other the

officers, seamen, and crew engaged for the voyage, and which are termed the ship's articles.*

The bill stated the preceding facts, and that upon the arrival of the ship at the port of London, the whole of the said cargo was possessed by the defendant; and the same having been previously sold by him, the purchase-money was shortly afterwards, and on the 27th of May 1823, possessed and received by the defendant. And that prior thereto, on the 2d May 1823, the defendant sent for the plaintiff to his counting house, and informed him that he had finally settled the ship's accounts, and that the charges and deductions to which, under the ship's articles, the gross proceeds of the cargo were subject, amounted to the sum of 3616*l.* 14*s.* 5*d.*, and the plaintiff's share was 162*l.* 9*s.* 2*d.*; from which, after deducting the sum of 51*l.* 9*s.* 2*d.* in respect of matters therein mentioned, there remained to be paid to the plaintiff the sum of 111*l.*; that the defendant desired him to accept that sum, and to sign a receipt for 162*l.* 9*s.* 2*d.*; but the defendant did not produce any account, receipt, or voucher, and the plaintiff, being much distressed, received the said sum of 111*l.*, and signed a receipt for 162*l.* 9*s.* 2*d.*

The bill charged, that a much greater sum was charged for casks and expenses than the defendant ought to have charged; and, particularly, that the defendant had improperly included amongst the alleged, usual, and customary charges and deductions, a sum of 1419*l.* 12*s.*, as being the amount of the prices of 338 tons of casks, while, in fact, 247 tons of casks only were used for the purposes of the ship and cargo; that the defendant's charge for the casks of four guineas a ton exceeded the cost prices; and that he had also charged the sum of 248*l.* 8*s.* 6*d.* for three and a half years' interest on the sum of 1419*l.* 12*s.*, and had improperly charged insurance on both these sums, and 2½ per cent. for brokage in addition to the 5 per cent. for commission; and the bill also charged, that the plaintiff was induced to receive the money paid to him, and to sign the receipt, under the pressure of immediate distress, and without the benefit of legal advice; and in consequence of the representation of the defendant, that he had fairly settled the ship's accounts, and ascertained the share of the plaintiff to be 162*l.* 9*s.* 2*d.*, and which representations plaintiff had since discovered to be false and fraudulent. And the bill prayed that the proper accounts might be taken, and the plaintiff and crew be paid their shares; and that, in taking the accounts, the defendant might be disallowed all payments made and claims set up by him, on account of any charges, deductions, or allowances which were not usual, customary, or proper.

The defendant, by his answer, admitted that the plaintiff was engaged as second mate, and in lieu of wages was to have an equal forty-fifth share of the clear produce of the cargo, which should be obtained on such voyage after the deduction of all usual and customary charges and allowances. The defendant set forth the articles of agreement with the crew, by which the officers and seamen did promise and agree with the owner, that the price of casks should be four guineas for each

* The share of the chief mate was to be a twenty-eighth part. The person intended to fill that office did not go; and the plaintiff states in his bill that he did the duties of it, and claimed, in consequence, a twenty-eighth instead of forty-eighth share; however, in the course of the argument, this claim was abandoned by the plaintiff's counsel.

ton with all other usual and customary charges, and 5 per cent. commission on amount of sales. And it was by such articles further promised and agreed by the parties thereto, that no officer or seaman should be entitled to his share until the amount of the cargo should be received by the owner or owners of the ship, (that is to say) when they should receive possession.

The defendant admitted that, under the said articles of agreement, the plaintiff sailed from London, and that the voyage was completed about the time in the bill mentioned. The defendant further admitted, that, according to the ship's articles, and to the course and custom of the trade in the South Sea whale-fishery, and with the privity and approbation of the crew of the ship, the whole of the cargo was possessed by the defendant upon the arrival of the ship at the port of London; and that the same, in the proper, usual, and ordinary course and mode of business in such cases, had been previously, and on the 9th November 1822, duly sold; and that the purchase-money, to the amount in the whole of 11,082*l.* 15*s.*, was, on the 27th May 1823, duly, and in the ordinary course of business, received by the defendant. And the defendant denied that he did, shortly after the arrival of the ship, or at any time, send for the plaintiff to his counting-house, and inform him that he had finally settled the ship's accounts, and that the share to which the plaintiff was entitled of and in the clear produce of the cargo, after deducting therefrom the usual and customary charges, deductions, and allowances on account of the cargo, amounted to the sum of 160*l.*, or any other sum; and that, after the deduction thereout of the monies due from the plaintiff on account of advances made and slops supplied to the plaintiff or otherwise, the balance remaining to be paid to the plaintiff would amount to 111*l.* or any other sum. And the defendant denied that he required the plaintiff to accept 111*l.*, and to sign a receipt for the same, or otherwise; or that he refused, or was asked or requested, to produce any accounts, receipts, or vouchers to enable the plaintiff to ascertain the amount of the moneys which he claimed to deduct from the gross produce of the cargo, on account of the usual and customary charges, deductions, and allowances chargeable against the cargo; or that defendant insisted that he had fairly settled and ascertained the amount of the plaintiff's share in the cargo; or that the plaintiff was much distressed for money after so long a voyage; or that he was unable to prevail with the defendant to come to any further account; or that, under the pressure of the said alleged circumstances, the plaintiff was induced to accept, or did accept, the sum of 111*l.* or any other sum.

The answer further stated, that the plaintiff, being desirous to receive his money from the defendant before the oil was gauged, and before the regular and due time for payment thereof, requested the defendant to settle with the plaintiff, on the principle of considering the oil (the quantity of which, within seven or eight tons or less, could be and then was known,) as being 230 tons of sperm oil, and ten tons of black oil. And the defendant did accordingly agree so to settle with the plaintiff; and that thereupon, the defendant showed to the plaintiff the account-sales of the oil, showing the sale and the price at which it had been sold as aforesaid; and he (defendant) then also told the plaintiff, in the presence of the surgeon of the ship, the amount of the

charges and deductions to which, under the ship's articles, the gross proceeds of the cargo are subject, such amount being 3616*l.* 14*s.* 5*d.*, with which the plaintiff expressed himself satisfied, nor did he ask for any further explanations or particulars respecting the same, which the defendant, if requested, was then prepared, and ready and willing, to give; that he paid plaintiff 151*l.* 5*s.* 11*d.*, which, with 11*l.* 3*s.* 6*d.* paid for him, made 162*l.* 9*s.* 5*d.*, and which, with 12*l.* previously paid in cash to the plaintiff, exceeded by several pounds his full share. That the plaintiff, thereupon, expressed himself perfectly satisfied; and, in the presence of the surgeon of the ship, signed and delivered to the defendant a receipt in full, as follows:—"Received the 2d day of May 1823, of Wm. Smith, the sum of 162*l.* 9*s.* 5*d.* for the ship Royalist, Captain Cook, on a voyage to the South Seas. I say in full of all demands against the said ship-owner and captain. James Spittal, 162*l.* 9*s.* 2*d.* Witness, M. Gaunt."

The defendant admitted that he had charged the produce of the cargo with 338 tons of casks at four guineas per ton, and credited the cargo with thirty-six tons of casks, returned at the average valuation by coopers on their arrival. Amongst the charges set forth in the schedule were

| | | | |
|---|---|---|---|
| 338 tons of casks at 84*s.* - - - - | £1419 | 12 | 0 |
| 3½ years' interest thereon - - - - - | 248 | 8 | 6 |
| | 1668 | 0 | 6 |
| Insurance on £1668 at £8 8*s.* per cent. - - | 140 | 0 | 0 |
| Interest on premium - - - - | £24 | 10 | 0 |

It was proved, by depositions on the part of the plaintiff, that about 257 tons of casks were used on board the ship during the voyage for the purposes of the cargo obtained on such voyage, and about ten or twelve tons of casks were also used for other purposes of the ship and voyage. And that it is usual and customary, amongst merchants and others engaged in the South Sea fisheries and trade, to debit the produce of the cargo obtained on any such voyage, and as part of the usual and customary charges and deductions, with the cost prices of such quantity of casks only as is actually used for the purposes of the voyage; and that it was not usual to debit the produce of the cargo with interest on the prices of the casks, or with the insurance of them.

On the part of the defendant, there were depositions of the surgeon of the vessel, that he (the surgeon) was present on the 3d June 1823, when a settlement of accounts relating to the voyage took place; and that upon that occasion the defendant distinctly stated to the late plaintiff, and the other parties present, the amount they would each have to receive for their respective shares of the cargo; and explained, in a general way, that the cargo, at the market-price of the day, was worth so much, and that the deductions and charges against the proceeds of the cargo amounted to so much; and in computing the amount of the share of the plaintiff and the rest of the crew, he (the defendant) had estimated the cargo at something above the market-price of oil. That Humphries, the third mate, refused to take the sum offered him by the

defendant as his share, but the plaintiff received the sum of 162*l.* 9*s.* 5*d.* as his share, and signed the receipt for the same; and the only observation which he made upon receiving the same was, that he hoped the defendant would make some addition to it, as a gratuity or remuneration for the plaintiff's having acted as first mate by reason of the officer engaged as first mate not having proceeded on the voyage; upon which the defendant asked the plaintiff whether, after the conduct which he had pursued throughout the voyage, he was not ashamed to make such a claim, particularly in the presence of the deponent, who had witnessed the plaintiff's irregular and unofficerlike behaviour throughout the voyage. That, upon this observation, the plaintiff took his money, namely, the sum of 162*l.* 9*s.* 5*d.*, which the defendant paid him, and left the counting-house with the appearance of being extremely well satisfied with the amount of what he had received from the defendant; and that the produced receipt was dated, by mistake, in May instead of June. And deponent remembered, that it occurred to him on his return home, that he (deponent) had misdated the receipt which he had drawn from the signature of the plaintiff on that occasion.

Mr Bickersteth and Mr Girdlestone jun., for the plaintiff. The ship went the voyage in 1820, and returned in 1823, having a cargo of oil on board, to which the plaintiff was entitled to a share. (They then went into some argument on the claim to the share of chief mate, which, having been subsequently given up, it is unnecessary to detail.) An instrument, which is called a receipt in full is relied upon by the other side as a complete discharge; but, after the defendant had given that receipt, he conceived he had not had his share, and demanded the accounts. With respect to the casks, the owner stipulated for a charge for them; but in the account he has charged for 338 tons of casks, at four guineas per ton, while the real quantity used was only 257 tons, and he is only entitled to charge to that extent. His charge for casks is 1419*l.* 12*s.*; he then charges for three and a half years' interest, 248*l.* 8*s.* 6*d.*, which is contrary to the custom of the trade. Not content with this, he has likewise charged for insurance on the casks; and the premium covers as well the interest, 248*l.* 8*s.* 6*d.*, as the price charged for the casks. The whole comes to this,—that the plaintiff having been employed to navigate the ship to the South Sea for a certain share, and the ship having returned, the owner states the account to the plaintiff, who, believing it to be correct, received his share accordingly; but that account proves to have been incorrect. It is the duty of the owner to show that the accounts were fairly made out. He has put in unjust charges, taking advantage of the confidence placed in him. We claim for the plaintiff a forty-fifth share, according to the ship's articles.

Mr Knight for the defendant. The plaintiff having given up that part of the bill which claims an allowance as chief mate, the bill, as to that claim, should be dismissed with costs. The costs of the inquiries on that claim are very great. The 162*l.* 9*s.* 5*d.* was paid to the plaintiff when he signed the receipt. Now, the plaintiff was not a common sailor, and was competent to inquire into the accounts; and if a man

who has knowledge of the subject chooses to settle an account, can he afterwards complain?

The MASTER OF THE ROLLS. Upon the return of the ship, the defendant settled with the plaintiff, on the ground that he was entitled to a forty-fifth share, and that is conclusive as to the share the plaintiff was entitled to. The bill can not be maintained on behalf of the plaintiff and all others of the crew, there being no case made for the others. The bill is reduced to a bill by the individual; and the account having been settled upon the ground that only the proper deductions had been made, the question is, whether the defendant was warranted to make the deductions he has made?

Refer it to the Master to inquire, whether the charges made for casks, interest, premiums for insurance, and provisions, are usual and customary charges in the trade of the South Sea whale-fishery, to be charged against the produce.

So much of the bill as claims the benefit of the office of chief mate to be dismissed with costs, reserving the payment of costs and further directions.

The bill, also, to be dismissed as to the others of the crew.

## Between William Cockle, mariner, on behalf of himself, and all the other unsatisfied officers and mariners, and persons entitled under or by virtue of the articles of agreement, plaintiffs; and Matthew Whiting and Francis Whiting, defendants.

1 *Tamlyn*, 55.

The master of a vessel in the South Sea whale-fishery, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of the net produce, sell a quarter of the cargo at 52*l.* per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the plaintiff, being apprised of it, settled accordingly.

Held, that that the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce; but the plaintiff, having settled, was too late for relief in equity.

Held, also, that having settled upon the estimated quantity, although the cargo ultimately proved to amount to six additional tons, yet the plaintiff having acted upon the estimate, he was not entitled to relief in equity.

*Westminster Hall*, July 3, 1829.

THE defendants were joint owners of the ship Elizabeth; and, in August, 1820, were about to send her to the South Seas for spermaceti, whales, or other produce of the South Sea, under the command of John Samuel Parker.

[Cockle *v.* Whiting.]

Articles of agreement were entered into by and between Parker as such captain, and as agent for and on the behalf of the defendants, and the officers, seamen, and others, then on board the said ship, or who should thereafter enter on board the said ship; including, in such description, John Inkley, as the chief mate, and the plaintiff as the then second mate of the said ship or vessel, whereby the said J. S. Parker, in his aforesaid capacity of agent for and on behalf of the defendants, bound or obliged himself to pay, or cause to be paid, to the officers, seamen, and others, such shares of the net proceeds of the sales of oil, whalebone, and head-matter, or seals, or other animals or substances whatsoever, the produce of the South Seas, caught or taken or obtained by the said ship's company, after deducting the usual charges and expenses, as were set opposite to their respective names and seals affixed thereto. And it was thereby further agreed, that John Samuel Parker, as the captain of the ship, should receive one twelfth lay or share of the profits of the homeward voyage, and John Inkley should receive one fortieth lay or share, and plaintiff one sixtieth lay or share thereof, and that such other persons who composed the remainder of the said crew should also receive the other shares or proportions therein mentioned. The bill stated, that this agreement was in possession of the defendant, who refused to produce it. The ship sailed in August 1820; and returned in November 1823, when the vessel arrived in the port of London, with 266 tons and 165 gallons of oil. The bill charged, that, on the arrival of the ship in London, the plaintiff and crew were in very necessitous circumstances; and plaintiff was prevailed upon by Messrs Moses and Levy, the agents of the defendants, to accept and take the sum of 41*l.* in full of 145*l.*, and to sign some memorandum or paper-writing, purporting, as it is alleged, to be a receipt for the same; and further charged, that the defendant settled with plaintiff and the rest of the crew at 42*l.* per ton, as the then market-price of the said oil, and actually charged the discount to the crew for prompt payment at such price: whereas plaintiff had since discovered, as the fact was, that, whilst the ship was out at sea, the defendant had actually sold, or contracted or agreed to sell, to some person or persons unknown to plaintiff, a considerable part, amounting to one fourth or thereabouts, of the said cargo, at 52*l.* per ton, and that such last-mentioned contract had since been carried into execution, and that the purchase-money had been actually paid or secured to be paid under the same, or otherwise that such contract was about forthwith to be carried into execution, and the money about to be paid under the same; and plaintiff therefore charged, that he and the rest of the crew ought to have been permitted to have had a share in the benefit of such contract, and that the defendants were guilty of a fraud in suppressing from plaintiff and the rest of the crew, the fact that they had sold such one fourth of the said cargo as aforesaid at 52*l.* per ton, and in not allowing them the full benefit of such contract; and that the defendants ought therefore, then, to be debited with such last-mentioned one fourth part of the oil at the aforesaid rate of 52*l.* per ton, and with the remaining three fourths of the cargo of oil at the rate of 42*l.* per ton, being the price at which they had admitted they actually sold such remaining three fourths of such cargo. And plaintiff further charged, that although the defendant then pretended, and still did pretend, that the gross produce of the cargo, after

allowing discount, computing the same at 42*l.* per ton, amounted only to 10,647*l.*; yet plaintiff charged, that the defendants on or about the 10th of March 1824, made out and delivered, or caused to be made out and delivered, to J. S. Parker, as captain of the ship, a certain account in writing, entitled "statement of the cargo and charges thereon ship Elizabeth;" and that in such account they gave him credit for 266 tons and 165 gallons of oil, which in fact, as plaintiff charged, comprised the real quantity of the cargo. And plaintiff further charged, that the defendants, or their agents, in such account gave credit for the whole cargo of oil at 41*l.* 10*s.* per ton; and that, taking the same at the last-mentioned rate, they acknowledged and admitted, by such last-mentioned account, that the gross proceeds of the oil amounted to 11,066*l.* 3*s.* 4*d.*, exceeding by the sum of 419*l.* 3*s.* 4*d.* the amount of the gross proceeds for which they gave plaintiff credit, although they allowed such oil to plaintiff after the rate of 42*l.* per ton. And further charged, that J. S. Parker insisted by himself or his agents, after the receipt of the account, that defendants should credit him with one fourth of the oil which had been sold by them as aforesaid, during the time the said ship was absent on her said voyage, after the aforesaid rate of 52*l.* per ton, and that the defendants ultimately acceded thereto, and did, in fact, settle with J. S. Parker as such captain of the ship, and pay him for one quarter of the cargo of oil, comprising 66 tons and 250 gallons, at and after the rate of 52*l.* per ton. And further charged, that defendants, having so settled with and paid the captain after such rate, were bound to pay plaintiff and the other unsatisfied part of the crew in like manner, after the rate of 52*l.* per ton for one quarter of the oil, but that they refused to do so.

Plaintiff further charged, that the settlement with him ought to be declared null and void, and that the defendants ought to set forth the accounts; and the bill prayed for an account of the dealings and transactions of the voyage, and of the monies arising from the sale of the cargo, and sums of money expended; that the former settlement might be set aside; that one quarter part of the cargo ought to be accounted for at 52*l.* per ton, and payment made to plaintiff and the rest of the crew of what should appear to be due to them respectively.

The defendants, by their answer, admitted the agreement in substance, and said that it was agreed and understood that the agreement, for engaging the plaintiff and the other persons forming the crew of the ship for the voyage, was to be in all other respects upon the terms and conditions which were usual and customary in South Sea voyages. The defendants admitted the articles to be in their possession, and they admitted that the ship arrived in the port of London, as mentioned in the bill, having on board a cargo of oil, the produce of the voyage, the quantity of which, as it eventually appeared, was 266 tons and 165 gallons. The defendants, further said, that, during the absence of the ship on the voyage, they became desirous of selling a part of the cargo expected to be brought back in the ship; but inasmuch as they considered that it would not be right or advisable to speculate with the proportion of the cargo to which the officers and seamen of the ship were entitled, especially as the price of oil had fallen about 20*l.* per ton since the sailing of the ship on her voyage, and had become lower than it had been for many years, and the officers and crew might, in the event of the price

rising, be dissatisfied with such sale by anticipation, they determined to sell one fourth part only of the expected cargo as a part of their own share or proportion thereof; and they accordingly, some time before the arrival of the ship, sold such one fourth part of the expected cargo at the price of 52*l.* per ton, to be paid in bills of exchange at four months, or in money, deducting 2½ per cent. discount, at the option of the buyers, at the end of fourteen days after landing at the seller's wharf; and such was considered, and was in defendants' instructions to the brokers employed to effect the sale expressly stated, to be made on their own account only, and as affecting their own share of the cargo only; and in case the price of oil had risen between the time of the sale and the arrival of the ship, the defendants alone would have borne the loss arising from such sale. And the defendants further answered, that it had become customary for the owners of such vessels, with the assent of the officers and seamen, to take the cargoes at the market-price at the time of the arrival of the ships, and afterwards to sell the same on their own account; and that, shortly after the arrival of the ship, Messrs Moses and Levy,—who were generally appointed to settle the accounts between the owners and the officers and crews of ships engaged in the southern whale-fishery in respect of the cargoes, and who were appointed the agents of defendants for the like purpose with respect to the cargo brought home by the ship Elizabeth,—did, according to such custom or practice, make out an account of the net value of the cargo, and of the shares thereof belonging to or due to the several officers and seamen. And Mr Deacon, the cooper, who was employed to ascertain the quantity of oil brought home by the vessel, and who was a person of great skill, experience, and respectability, in his business, having reported the same to amount to 260 tons, (after making by computation such allowances and deductions as were customary on the sale of such cargoes,) the cargo was estimated at that quantity, and the market-price of such oil then being estimated or taken in the account at the rate of 42*l.* per ton, and a deduction of 2½ per cent. made therefrom on account of the discount for money on the amount of the price of the oil, and the other usual charges and expenses were also deducted from the same; and defendants added, that Moses and Levy had settled accounts with the remainder of the crew in like manner, and that they had sold the remainder of the cargo at 41*l.* 10*s.* per ton; they denied that the plaintiff was pressed for money, and also all fraud; and they alleged that oil varied in quantity, according to the state of the atmosphere. The defendants also said, that after the settlement the plaintiff called on them, and asked to be allowed something for having acted as chief mate; when the sale of a quarter part of the cargo, previous to the arrival of the vessel, was mentioned, and plaintiff said he was satisfied; defendants at the same time making him a present of 5*l.* for having acted for some time as chief mate, and upon the understanding that all accounts were settled, and that the plaintiff should make no further claim.

There were depositions on the part of the defendants proving the correctness of the account, and that 42*l.* per ton was beyond the then price of oil, and that plaintiff inspected the accounts, and appeared quite satisfied therewith.

[Cockle *v.* Whiting.]

Mr Bickersteth and Mr Phillimore, for the plaintiff. By the contract, the plaintiff, as second mate, was entitled to a sixtieth share. In the accounts made out by Messrs Moses and Levy, the proceeds were stated at less than they really were. The plaintiff and crew were settled with only for 260 tons, and those at 42*l.* per ton: in fact, the quantity was greater; and a fourth part of the cargo had been sold, before the vessel arrived, at 52*l.* per ton. The defendants allege, that it was their own share as owners which they sold; but we contend that they had no right to sell a portion for themselves. It is true, that when the vessel arrived the oil was only worth 42*l.* per ton. The real quantity was six tons more than was accounted for, and a reason assigned for this by the defendants is, that the quantity of oil is affected by the weather; but the crew are entitled to their shares on the quantity sold, and the money at which the cargo has been actually sold. The plaintiff has not received his part, for he is entitled to a share of all the cargo.

The Master of the Rolls. The defendants have clearly acted by mistake; for they were not entitled to a part of the cargo, but only to a part of the produce, and they are bound to account for the whole produce, and are not entitled to any advantages; but it appears that the mode of dealing had been stated to the plaintiff, and he settled accordingly. It is much too late for the plaintiff now to come into equity for relief. With respect to the quantity of oil, it appears to be the custom for the cooper to estimate it. That estimate in this case was 260 tons, and it was so stated to the plaintiff: it turned out to be seven tons more, but it might have been seven tons less; the plaintiff accepted and acted upon the estimate. It is too late now for the plaintiff and crew to come into equity, when they find they have made an unprofitable speculation. The bill must, therefore, be dismissed, and with costs.

Mr Knight, then referring to the unnecessary statements in the bill, and the great expenses which had been incurred by inquiries rendered necessary by those statements, called upon the court to fix the costs upon the plaintiff's solicitor, it being sworn in the answer that the plaintiff had declared that the solicitors had indemnified him against the expenses of the suit; and in an affidavit in a former proceeding, it was imputed to the plaintiff's solicitors that they were to indemnify the plaintiff in costs.

The Master of the Rolls said he could not entertain it in that way—a petition must be presented.

## Between the Earl of Winchelsea and Vaughan, Bart., plaintiff, and Eleanor Garretty and others, defendants; and between Henrietta Bellinden and other plaintiffs, and Vaughan, Bart., and Earl of Winchelsea, defendants; and between Vaughan, Bart., plaintiff, and Eleanor Garretty and others, defendants.

1 *Tamlyn*, 63.

Two ladies borrow 10,000*l.* of Coutts and Co. on the bond of themselves and G. N.; they gave a bond for 12,000*l.*, at the same date, to G. N. A question having arisen, whether the bond was for indemnity, or a gift for services, or otherwise, the court directed issues to be tried before a jury.

*Westminster Hall*, June 29, 1829.

THIS cause came on upon exceptions: the first cause was for establishing the will, and taking the accounts of the personal estate of Lady Essex Ker; and the second cause was by a cross-bill, stating that Lady Mary Ker and Lady Essex Ker were in their lifetime, as co-heiresses, seised of lands in Scotland; and that they jointly and severally had contracted various debts, and given several securities for the payment of some such debts to a considerable amount; and, amongst other such securities, they executed and gave a joint and several bonds under their hands and seals to one George Nicholls, for securing the payment of the sum of 12,000*l.* and interest at 5 per cent. per annum; and a joint and several bond to Thomas Coutts, Esq., and others, his partners, for securing the payment of the sum of 6000*l.* (which was afterwards found to be 10,000*l.*) and interest at the rate aforesaid, both of which bonds were executed in England, in the usual form of English bond.

George Nicholls claimed the bond given to him before the Master, and a reference was made to inquire into the consideration of it; in which he was examined, and the Master's report set forth that examination at considerable length, the material parts of which will be found in the arguments of counsel; and found that Lady Essex Ker, the testatrix in the pleadings in this cause named, employed for many years previous to her death Messrs Coutts and Co. as her bankers; that the said George Nicholls was also for many years previous to her death the confidential friend and adviser of Lady Essex Ker, and in the habit of raising money to supply her occasions by procuring advances from Messrs Coutts and Co., upon joining in notes and other securities with the testatrix and with Lady Mary Ker, her sister; that in the month of February 1813, a sum of 2000*l.* was borrowed from Messrs Coutts and Co. by Lady Essex Ker, and for which sum George Nicholls joined in a bond, bearing date the 8th February 1813, as a security for the payment thereof; that in the month of July 1815, Lady Essex Ker, the testatrix, having occasion for a further loan, applied to Messrs Coutts and Co., through the agency of George Nicholls to advance her and her sister, Lady Mary Ker, the sum of 10,000*l.*;

and which they agreed to do, on having the bond of Ladies Essex and Mary Ker, and George Nicholls as their surety to secure the repayment thereof; and accordingly the bond stated in the charge of George Nicholls and Messrs Coutts and Co., bearing date the 15th day of July, was given to them. And after paying themselves the amount of all previous securities which had been given to them, the balance of the 10,000*l.* was placed by them to the separate accounts of Lady Essex Ker and Lady Mary Ker, in the proportions each party was entitled to. That on the 15th July 1815, the testatrix and lady Mary Ker gave to George Nicholls the bond stated in his charge, and in the charge of Messrs Coutts and Co. for securing the sum of 12,000*l.* and interest. That, at the time such last-mentioned bond was given, Messrs Barclay and Moore of Lincoln's Inn were the solicitors of the ladies; and, upon inspection of their bills, it did not appear that they were consulted, nor was any professional person present when the same was executed. The plaintiffs had therefore, submitted to the Master, that such last-mentioned bond was given to George Nicholls as an indemnity to him against his liability to pay to Messrs Coutts and Co. the sum of 10,000*l.*, for which he had joined the ladies in a bond to Messrs Coutts and Co., and for any future sums that he might procure for them on his responsibility; and that no consideration was paid to the obligors by George Nicholls.

Several letters of George Nicholls were set forth in the report, expressive of his personal inability to advance money.

And the Master also found that Lady Essex Ker, in and by her last will and testament, bearing date the 7th day of September 1819, gave and bequeathed to George Nicholls the sum of 2000*l.* in the following words:—"To my friend George Nicholls, for his services, I leave 2000*l.*;" and upon consideration of the examination, the letters and the several circumstances thereinbefore stated, the Master was of opinion, that the bond under the hands and seals of the right honourable Lady Essex Ker, and the right honourable Lady Mary Ker, was not a bond of indemnity, but was a voluntary bond given to George Nicholls as a bounty by the Ladies Essex and Mary Ker, without any consideration having been paid or given by George Nicholls for the same.

Sir R. W. Vaughan, Bart., excepted, that the Master ought to have certified, that the bond was given to George Nicholls by way of indemnity against payments made and liabilities incurred by him on account of Lady Essex Ker and Lady Mary Ker.

And George Nicholls excepted, that the Master ought not to have certified that the bond was given to him (George Nicholls) as a bounty by the ladies, without any consideration having been paid or given by George Nicholls for the same, but ought to have certified that the same was given to George Nicholls by the Ladies Essex and Mary Ker partly for services performed by him (George Nicholls), and partly for money lent and advanced by him to the ladies.

Mr Pemberton in support of the first exception. The Ladies Ker became bound to Messrs Coutts for 10,000*l.*, on the 25th of July 1815. Another bond of the same date has been carried in: both bonds bear date the same day; the latter to Mr Nicholls for 12,000*l.*; that gentleman was a surety for them to Messrs Coutts. The claim was resisted

by the executors, they considering it to be a counter security to Mr Nicholls. A reference was made to the Master to inquire into it, and an order was made that Mr Nicholls should be examined. The Master has found that the bond to Mr Nicholls was not a bond of indemnity, but was a bounty to Mr Nicholls without consideration. Both parties have excepted to this finding: the executors against the finding that it was not indemnity; and Mr Nicholls against its being a gift. Mr Nicholls in his examination has deposed to various payments made by him, that he gave up the vouchers and securities for moneys due to him when the bond was given to him, and that the Ladies Ker meant by their bond to satisfy his services of which they frequently spoke; and that those ladies fixed the sum of 12,000*l.* themselves although the sum of 10,000*l.* was originally fixed upon. This appears to prove, that it was meant to be an indemnity for the like sum for which he was security in the bond to Messrs Coutts. The effect of the examination appears to be, that there was no settlement of accounts when the bond was given. Our belief is, that to the extent of 10,000*l.* it was indemnity, the remaining 2000*l.* a gift.

The Master of the Rolls. How can this be settled without a jury? In a case of this sort, it is right to give the parties an opportunity to proceed at law.

Mr Tinney and Mr Wigram for Mr Nicholls's representatives. We proceeded at law in Scotland. Mr Nicholls is dead. Miss Garretty, a confidential servant, is dead; and Mr Moore is dead: both of them were well acquainted with the circumstances of this case. No further evidence can be produced. The evidence now consists of Mr Nicholls's examination, and some letters: there is now no evidence but what is found in the report. Every person is dead who knew any thing about it. We admit that we can not make out any proof of moneys paid: we contend that the bond was given for services: it has no reference to the bond to Coutts; no presumption arises that it was indemnity,—the only ground for it is, that both bonds are of the same date. Mr Coutts himself advanced Mr Nicholls 3000*l.* on this bond, which shows his opinion to have been that the bond was a good one.

Mr Stuart for defendants in the third suit.

Mr Pepys, for persons interested in the estate of the Ladies Ker, pressed for an issue.

The Master of the Rolls. I know no instance in which a court has decided such a case without a jury. Take these issues:—

First, Whether at the date of the bond, the Ladies Ker, were indebted to Nicholls for services by him performed or moneys advanced?

Secondly, Whether the bond was an indemnity to Mr Nicholls for his joining in the bond to Coutts, or in respect of any other engagement into which he might have entered as a surety for these ladies.

Thirdly, Whether the bond was, as to any and what part, intended as a gift to Mr Nicholls? The representatives of Mr Nicholls to be plaintiffs in the first and third issues; the plaintiffs in equity to be plaintiffs in the second issue.

Let the jury indorse any special matter.

## Beevor *v.* Simpson.

1 *Tamlyn*, 69.

A., having purchased land, left the investigation of the title to C. and D., solicitors, in partnership. They advise that a good title can be made, and the purchase is thereupon completed. D., the solicitor, was a trustee in the conveyance to bar dower. A. dies, and his devisee sells the property to D., one of the solicitors. D. did not object to the title until eight months afterwards; in his answer he said, he had no recollection of the title:

Held, that a solicitor, who has been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal.

Decree for specific performance.

*Westminster Hall*, June 30, 1829.

THE plaintiff being seised in fee of a messuage or dwelling-house and land, in August 1825, contracted to sell the same to the defendant for 4,500*l.*, and to deliver possession to the defendant on the 25th March next, on payment of that sum. There was nothing said in the agreement with respect to the vendor making a title. The bill charged, that the defendant had a full knowledge of the title; and that he entered into the contract with the plaintiff with the intention and understanding that he should take and accept the title of the plaintiff, and take a conveyance of the same from her, without requiring any other or better title thereto to be made out by the plaintiff; and, as evidence thereof, the plaintiff charged, that in or about the month of March 1818, Henry Beevor, doctor of medicine, since deceased, late husband of the plaintiff, being desirous of purchasing the land whereon no buildings then stood, and which was then the property of one Stephen Mear, for the purpose of building a dwelling-house and offices thereon, employed the defendant, who then was and had been for many years previously thereto, and continued to be till the death of Doctor Beevor, his solicitor and confidential friend and adviser, as his solicitor and agent in negotiating such purchase on his behalf with Stephen Mear, and in investigating Stephen Mear's title to the land. And that, accordingly, the defendant did as his solicitor and agent, and on behalf of Beevor, investigate the title of Stephen Mear to the land; and thereupon advised him that Stephen Mear had a good title, both legal and equitable to the same, and did not advise him that the legal estate therein was, as the defendant had since objected, in the heir at law of one Mary Drinkwater, or that there was any defect whatsoever in the title of Stephen Mear; and that the conveyance by lease and release was prepared by the defendant, and to which he was himself a party, as trustee, for the purpose of preventing the attachment of dower. That the title of Stephen Mear was derived under the will of Mary Drinkwater, and was the same title to which the defendant had made an objection; and that, in consequence of such advice of the defendant, Doctor Beevor completed his contract, and built a dwelling-house and offices at the expense of 2,000*l.*

The bill also charged the following facts:—That the plaintiff was the devisee of Doctor Beevor; and, in entering into the contract with the defendant, she was not assisted or advised by any other solicitor but himself.

That on the 25th of October 1825, the defendant paid to the plaintiff the sum of 500*l.* in part payment, and the defendant never called for an abstract till April 1826; and, after the same was delivered to him, he agreed with the plaintiff for some fixtures in the house, and joined with her in appointing a person to value them. The defendant never made any objection to the title till August 1826. The prayer was for a specific performance.

The defendant, by his answer, stated, that he carried on the business of an attorney in partnership with Mr William Rackham; and he admitted, that he and his partner were employed by Doctor Beevor as his solicitor; and although he admitted that the abstract was perused and examined in their office on the part of Doctor Beevor, yet he did not recollect or believe that he did himself peruse or examine the same; and if he did in fact do so, that he had no recollection whatever of the contents thereof, or of the title of the plaintiff to the premises in the bill mentioned, or any part thereof, at the time of his entering into the agreement. Nevertheless, the defendant said, that from the present state of the title, he believed that it appeared by the abstract received by the defendant, that the fact was, that a good title could not be made to the premises, or to any part or parts thereof, (except the premises purchased of one Jonathan Mitchell,) in consequence of the legal estate in the whole of such premises being outstanding. And the defendant said, he objected to the title, that the legal estate of such parts of the premises as were purchased of Stephen Mear was outstanding in the heir at law of Mary Drinkwater, and that he had no recollection of the plaintiff's title at the time of his (defendant's) purchase. And the defendant admitted, that he was a trustee of Henry Beevor in the conveyance to the latter for the purpose of barring dower; and that the conveyance was drawn, prepared, settled, and approved at the house of defendant and his partner, but not, as the defendant believed, by him, but by his partner.

The other parts of the bill were admitted in the answer. It was also charged by the bill, and admitted by the answer, that the defendant purchased these premises for a company which he had joined for the purpose of supplying the city of Norwich with water; and that it was mentioned in the specifications left with the clerk of the peace, preparatory to an act of parliament, that these premises were the property of the company.

Mr Bickersteth and Mr Kindersley for the plaintiff. The question is, whether the defendant is entitled to a better title than the plaintiff now has, and, in particular, with respect to the legal estate outstanding in the heir at law of Mary Drinkwater? The defendant has admitted, that on the occasion of the purchase by the late Mr Beevor, the title was passed through the office in which he is partner; but he endeavours to escape from the responsibility of it, by his answer, that he did not recollect that he himself perused it. If this were material, it was well met by an indisputable fact, that the defendant was a trustee in the

conveyance to the several uses and trusts, which conveyancers introduce to prevent dower from attaching to the land; and this is strong evidence that the defendant was the particular member of the firm retained by Dr. Beevor, and in whom that gentleman confided. It is clear, that when the defendant entered into the contract, he did not intend to question the title; and, in fact, never did until after the time had elapsed when he ought to have completed his contract; nor until the plaintiff found it necessary to employ another solicitor, in consequence of the delay of the defendant in carrying the contract into execution. The court can not allow a solicitor thus to act. The defendant had accepted the title; since, in the specification deposited with the clerk of the peace, this property is stated to be the property of the intended Norwich company, in which he was also partner. That speculation, however, was not proceeded in, and the defendant now found it convenient to disclaim that admission. At the time of the purchase, the defendant well knew that Doctor Beevor bought the land for the express purpose of building a house upon it: and, therefore, it was doubly wrong in the defendant, as his solicitor, to overlook an objection to the title.

Mr Pepys and Mr Turner for the defendant. One of the grounds relied on by the plaintiff, is the defendant's situation in 1818, when Dr Beevor purchased this property, as to which it is said, that the defendant had the management of the purchase; but the defendant by his answer has denied that he had personally any thing to do with advising Dr Beevor to complete the purchase. Surely a solicitor is not bound by all the circumstances that have taken place in the office of himself and his partner as controlling his own equities. On such a principle, every counsel and solicitor who had advised on a title to property which they might subsequently happen to purchase, must, themselves, take it on the same title. It was also said, that the defendant had done nothing up to March 1826; but, on the other hand, the plaintiff did nothing,—the purchase went on as between other parties until the objection was discovered: to establish a waver of it, there must be actual personal notice.

The Master of the Rolls. The defendant merely denies it upon recollection.

Mr Pepys. But in this case the defendant had no actual notice; and he does not come within the proposition of a man proceeding under a contract with the knowledge of a defect. The payment of part of the purchase-money is no waver of title, and very commonly occurs. As to the valuation of the fixtures, in purchases of land when the timber is to be valued, the valuation goes on contemporaneously with the investigation of the title. It is always assumed that a vendor shall make a good title; and unless the court shall be of opinion that a solicitor, who has been employed eight years before on the purchase by the vendor, is bound to take a purchase without any title, a decree will not be made for the plaintiff.

The Master of the Rolls. It is not to be endured in a court of equity, that a solicitor who has been employed by a person to advise on the title to a property, should, on purchasing the same property from

his client, set up an objection to the title which he did not think of any importance when advising his principal. The inference arising from the defendant's answer is, that he was consulted, and that is supported by the circumstance of his being a party to the conveyance: it is also to be inferred, that he was perfectly acquainted with the title at the time he entered into the contract; his denial of recollection amounts to nothing.

Decree for specific performance, with costs.

## Salmon *v.*

1 *Tamlyn*, 74.

THE court will, on the petition of an assignee of the reversion, order the Accountant-General not to transfer stock, although the petition has not been served on the assignor.

*Westminster Hall*, July 3, 1829.

## Drury and another *v.* Atkins and another.

1 *Tamlyn*, 75.

BY the act of 59 G. 3, c. 111, navy agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. The defendants having received 450*l.* as two and a half per cent., returned premium on 18,000*l.* in 1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average, referred to the Master, to inquire whether he was entitled so to retain it, according to the usage and custom of merchants.

*Westminster Hall*, July 7, 1829.

## Devey *v.* Peace.

1 *Tamlyn*, 77.

Where a sole trustee in a will, to whom a term of 2000 years was devised, die in the testator's lifetime, the court will refer it to the Master to appoint a new trustee, and to settle and approve of a demise for the like term.

*Westminster Hall*, July 10, 1829.

FRANCIS PEACE by his will devised his real estate unto his brother William Peace, his executors, administrators, and assigns, for the term of 2000 years, upon trust to raise a sum of 4000*l.*, and as therein

[Devey *v.* Peace.]

mentioned, and subject thereto, as to one moiety to Thomas Peace for life, remainder to trustees during his life, to preserve contingent remainders, with remainder to the eldest son, &c. of Thomas Peace, who should be living at his death, upon his attaining the age of twenty-one, with remainders over in case there should be no son, or, if any, he should not attain that age. The moiety was limited to George Peace in like manner. William Peace died in the testator's lifetime.

Thomas Peace had no issue, and the children of George Peace were all under age.

The prayer of the bill was, that the trusts of the term might be carried into execution, and that a trustee might be appointed in the place of William Peace.

The expediency of raising the moneys provided for by the term was acquiesced in by all the counsel, and the only question was, how it should be accomplished.

Mr Knight, for the plaintiff, suggested that the tenant for life and trustees should join for this purpose in destroying contingent remainders.

The Master of the Rolls. Refer it to the Master to appoint a new trustee, and to approve of a demise or lease for a term of 2000 years, for the like purposes as in the will.

Only one trustee having been appointed by the will, the Master will only have to name *one*.

## Collyer *v.* Burnett.

1 *Tamlyn*, 79.

THE court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity.

Legacies to charities in Ireland are administered by commissioners there, under an act of the Irish parliament.

*Rolls*, July 10, 1829.

## Bass *v.* Clivley, widow.

1 *Tamlyn*, 80.

A. agrees to lend B. 3000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l.* in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l.* and interest:

[Bass *v.* Clivley.]

Held that he was not entitled to the title, but only a specific performance of the contract, as proved; and that the plaintiff, not obtaining the decree he asked, shall pay the costs.

*Rolls*, July 17, 1829.

THE bill states, that the defendant, being in want of money, directed William Oliver to apply to the plaintiff for the loan of 3000*l.*, which the plaintiff agreed to lend for five years, at lawful interest, on having a sufficient and valid mortgage of five leasehold houses; and the plaintiff paid him 600*l.*, when Oliver, as such agent, deposited with the plaintiff one of the leases, and signed a memorandum in writing, declaring that he had received that sum for the defendant, and that he had deposited the lease for securing the repayment thereof with interest; the remainder was to be advanced to him as soon as the necessary securities should be prepared; but the defendant had refused to show her lessor's title. The bill prayed, that the defendant might be decreed to perform the agreement, and to accept or receive the sum of 3000*l.*, which the plaintiff was willing and offered to advance, on having the whole of the principal sum secured by mortgage, according to the agreement, or that an account might be taken of what was due to the plaintiff for principal and interest on the 600*l.*; and that the defendant might be decreed to pay what, on taking the account, should be found to be due to him thereon; or that the lease or leasehold premises might be sold, and the money to arise from the sale, or a competent part thereof, applied in discharge of the 600*l.* and interest; or that the defendant might be decreed to make and execute to the plaintiff, and to procure all proper parties to join in making and executing to him, a good and effectual assignment of the leasehold premises, by way of mortgage, for securing to the plaintiff the repayment, with interest, of the principal sum of 600*l.*

The defendant, by her answer, said, that the complainant had agreed to lend and advance to her the whole of the 3000*l.* for 5 years, at the rate of 5 per cent. per annum, on the security of the leasehold houses and premises, it being at that time, or previously thereto, distinctly stated to the complainant by William Oliver, and agreed to by the complainant, that the complainant could not inspect the lessor's title to the same; and that the complainant expressly agreed to waive whatever right he might otherwise have had to such an inspection; and that he would lend and advance to the defendant the sum of 3000*l.* upon the security of her title as lessee thereof only. And she further said, that her solicitors took all the necessary steps for evidencing her title to the leasehold houses, and did every thing that was requisite for establishing the same, and giving reasonable satisfaction thereof to the complainant. That she had always been and still was desirous to have the agreement carried into execution, which she submitted to the judgment of the court she was entitled to have done.

On the part of the defendant, the evidence of William Oliver was read, and he deposed, that in negotiating for the loan, he stated to the plaintiff, that the property which he proposed to mortgage was held by her on lease direct from the owners of the freehold, and that their title could not be inspected. To which the plaintiff replied, that if the property was of sufficient value, he would be satisfied with such secu-

rity; and that a few days afterwards the plaintiff told witness, that, in consequence of the report of the value which he had obtained from a person he had employed, he was willing to lend the defendant 3000*l.* for five years, on this security, and that the plaintiff expressed himself satisfied with the proposed security, without investigating the title to the freehold.

Mr Roupell, for the plaintiff. We ask that the defendant shall perform her agreement, by giving a mortgage, on receiving the difference between 600*l.* and 3000*l.* She must show that the leases are valid leases; but she refuses to produce the landlord's title. The plaintiff is a purchaser *pro tanto*. The Master may inquire into the title, and if the defendant shall be found to have a good one, the plaintiff is ready to advance the whole sum. But the plaintiff offers the alternatives, that the 6000*l.* shall be repaid to him, or that the leases shall be sold.

Mr Knight for the defendant. The defendant has always been ready to repay the 600*l.* and interest. It has been satisfactorily proved, by the depositions of the witness Oliver, that the plaintiff agreed to lend the money without investigating the lessor's title to the freehold.

Mr Knight then read from Oliver's deposition, that a Mr Allwood suggested the propriety of the plaintiff having an acknowledgment of the 600*l.*, and drew up a memorandum, the substance of which was,—"Received of Mr Bass 600*l.*, part of the sum of 3000*l.* agreed to be lent by Mr Bass for five years, at five per cent. interest, to Mrs Clivley, on the security of the five houses," and which the deponent signed.

The Master of the Rolls (after stating the prayer of the bill):

Now that there was an agreement is distinctly made out, but no such agreement as that stated in the plaintiff's bill has been proved. The witness Oliver has distinctly deposed, that the plaintiff was not to require the landlord's title; the plaintiff, therefore, can only have a specific performance of the agreement as proved, he can not have a decree for the sale of the property to raise the 600*l.*, nor for a mortage for that amount. If he does not choose to have the agreement performed as proved, the bill must be dismissed with costs.

Mr Roupell elected to take the decree for specific performance.

Mr Knight then called his Honour's attention to the defendant's answer, that the plaintiff had refused to go on with the agreement, and that the defendant was anxious to perform it.

The Master of the Rolls. Then the defendant must have her costs. The plaintiff does not obtain the decree he asks, that he should inspect the lessor's title. The court is of opinion, that that was not part of the agreement; and if a plaintiff insists upon what he is not entitled to, whilst the defendant has been ready to perform the agreement really entered into, the defendant is entitled to costs. It is a frequent practice to give costs against a plaintiff who has a decree,—the real question being, by whose fault were the costs incurred.

His Honour then suggested that the better way would be for the defendant to repay the 600*l.* and interest, and have back her lease.

## William Barnham, plaintiff; and Richard Munn and Ann his wife, defendants.

1 *Tamlyn*, 84.

A. agreed to lend B. a loan of 600*l.* navy 5 per cent. stock. He sold the stock for 522*l.*, which he paid to B. A bond is drawn by an unprofessional man to repay "the sum of 522*l.*, (being the produce of 600*l.* stock, 5 per cent. navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but B., on discharging the bond, refused to transfer the stock, and would only pay the money received by her; to this A. objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond:

Held, that A. had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but the costs were refused.

*Rolls*, July 17, 1829.

IN the year 1815, the defendant, Ann Munn, (then Ann Adams, widow,) agreed to borrow of the plaintiff 600*l.* navy 5 per cent. annuities, and to pay the plaintiff the dividends thereof, until she re-transferred the stock to him. The plaintiff sold out the stock, and it produced 522*l.*, which was paid over to Ann Munn, who then executed a bond for 1000*l.*, to repay to the plaintiff the sum of 522*l.* of good and lawful money of Great Britain, (being the produce of 600*l.* stock, 5 per cent. navy, or such other sum as would replace the stock,) on the 3d day of August 1816, with lawful interest for the same.

The bill stated, that the bond was, in order to save expense, drawn by a person not in the profession of the law, and was not, according to the terms of the agreement between the parties, which was, that the stock itself should be re-transferred; and there were various circumstances stated in the bill in confirmation of it: but Mrs Munn, after paying the dividends on the stock for many years, refused to transfer the stock, and would only pay the 522*l.*, which the plaintiff for some time refused to accept; but he, being much in want of money, at length did receive it, and gave up the bond, yet at the time of doing so he strongly protested against the illegality and injustice of the proceeding. The bill prayed, that it might be declared that the stock should be replaced, or an equivalent paid to the plaintiff, or that a reformed and new bond might be executed to him for the difference, being 130*l.*

Mr Treslove and Mr Presland for the plaintiff, proposed to read parol evidence of the agreement really made between the parties.

Mr Pepys and Mr Koe, for the defendants, objected to parol proof

being received of an error in the instrument; but the objection was overruled.

Plaintiff's counsel then read depositions which proved that the agreement was as stated in the bill, and that 15*l.* had been half-yearly paid to the plaintiff, which was the amount of the dividend on the stock sold out; and afterwards read the deposition of Mr Bower, the attorney of the defendants, as to what took place at the time the bond was discharged by the defendants, wherein he deposed that the plaintiff did remonstrate on the unfairness and injustice of returning the loan in money, but that the witness told him he could only pay him 521*l.* in discharge of the bond. That the plaintiff at first refused to receive the money, but did, before he left the witness, take that sum and give up the bond; and plaintiff, whilst he was receiving the money, kept uttering his complaint as to the unfairness and injustice of returning the loan in money instead of stock, or not paying him, in addition to the aforesaid sum, the difference of price when he sold out the stock for the accommodation of the defendant, Ann Munn, and the then market price of the day of the same stock. That whilst the deponent was paying the money to the plaintiff, or immediately afterwards, deponent's partner, Mr Lowe, came into the room, and a conversation ensued between Mr Lowe and the plaintiff on the subject of the bond, and the amount paid in discharge of the same; when Mr Lowe remarked, that the money could only be paid in discharge of the bond, and the plaintiff reiterated his complaint of the unfairness and injustice of not replacing the stock, or paying him the difference, until he was desired to leave the room. There was no evidence that the plaintiff was distressed for money.

The plaintiff's counsel argued, that the loan was one of stock and not of money; that the security was intended to be to re-invest the stock; that the transaction was for years treated as a loan of stock, by the annual payment of the sum equal to the dividends, and other evidence; and that, under the circumstances in which the bond was paid and returned, there was no abandonment of the plaintiff's claim for the difference, and that the court would interpose to reform the instrument. Townshend *v.* Stangroon, 6 Ves. 328., and Henkle *v.* The Royal Exchange Insurance Co. 1 Ves. 317.

The Master of the Rolls. The question is, can the plaintiff now sustain the suit after he has received the money? The party should not receive, unless in doing so it is stipulated that the remedy shall remain open. I am of opinion, that, upon the evidence of Mr Bower, this bill must be dismissed.

Mr Pepys applied for costs.

Master of the Rolls. I can not give costs.

**Between George Jackson, plaintiff; and Sir Charles Forbes, Baronet, Thomas Faulkner Middleton, and Caroline Erskine his wife, and George Jackson Jackson, and John Anderson Jackson, Ann Jackson, and Jane Jackson, all infants out of the jurisdiction, John Hopton Forbes, administrator *ad litem* of Colin Anderson the younger, and of Jane Jarvis Anderson, both deceased, Matthew Hole, administrator of the plaintiff's deceased infant daughter Caroline Anderson, and his Majesty's Attorney-General, defendants.**

1 *Tamlyn*, 88.

A testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says: "As the whole of this estate is to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct, that their shares may be so settled on themselves during their lives, and on their children, in equal proportions, after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds:—"Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; and in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families: upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had.

Held, that the boy, on attaining twenty-one, took an absolute interest in his share.

Held, that the daughters took for life, with remainder to their issue.

Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares.

*Rolls*, July 13, 1829.

COLIN ANDERSON by his will, dated the 25th October 1802, disposed of his property as follows: "I desire that my house and grounds in the island of Coolabah, together with my household furniture, horses, and liquors, may be sold at public outcry to the highest bidder, and the produce placed to the credit of my estate. On the 1st of January 1802, I shall have assets in India to the amount of 19,000*l.* sterling, running on at interest with mercantile houses (therein mentioned;) and I am entitled to a further division of prize money. There is one boy at home named Colin Anderson, born on or about the 25th October 1788, now at school at Glasgow, and boarded with Mr John M'Arthur there. There is one girl in India, named Jane Jarvis Anderson (since deceased,) born at Poondamalie, near Madras, on the

2d October 1797. There is one girl in India, born at Mangalore, on the 21st September 1800, named Anne Nesbitt Anderson, the late wife of the plaintiff. There is in India, born at Coolabah, on the (meaning the defendant Caroline Erskine Anderson.) To those children, or the survivors of them, and their heirs, I leave the whole of my property in equal divisions, subject to such regulations and legacies as I shall hereafter mention." The testator, then, after giving a legacy and an annuity to the mother of three of the children, and giving annuities to his father, mother, brother, and sisters, proceeds as follows:—"To provide for the legacies and the education of my children, my executors are hereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds (those of the India company, perhaps, as safe as any;) but I leave the choice entirely to my executors, in whose regard for the interest of the children I have implicit confidence; and yearly, after the regular payment of the legacies and the expenses of the children, any remaining balance is to be added to the principal, for the benefit of the whole. As the annuitants die, the principal producing such annuity is to revert to the common stock, for the benefit of the whole. As the whole of this estate is to be equally divided amongst the before-mentioned four children, viz. Colin Anderson, junior, Jane Jarvis Anderson, Anne Nesbitt Anderson, and , or the survivor of them, a regular division must be made of the estate when each comes of age, or is married, and the share of such person is not to be considered any longer belonging to the public stock, but to the particular person so coming of age, if a boy; subject, however, to the control of my executors, their heirs or assignees, for nine years more, when he will have arrived at years of discretion, if ever. When the girls, or any one of them, become of age, or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children in equal proportions after their deaths, that it will not be in the power of their husbands, if so inclined, to injure either their wives or children; and my executors, their heirs, and assignees, are hereby supplicated to take every possible precaution against so distressing an event. Should it be the will of God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in cases of issue, these children are to inherit the share of their parents amongst them equally, and in case of their dying without issue, it is to return for the benefit of the survivors of those four children or their families: upon the reversion of any sums to the public stock the issue of a deceased child is to have the share that its parent would have had if living. But, again, if such issue die without issue, the whole of its original and after shares revert to the common stock. And I hereby constitute, nominate, and appoint my beloved brothers Lieutenant Alexander Anderson, Patrick Anderson, Lieutenant-Colonel Lacklan M'Quarie, and Charles Forbes of Bombay, esquire, executors of this my last will and testament." The testator afterwards made a codicil to his said will, whereby, amongst other things, he directed his house and land to be sold, and he gave various legacies to certain persons therein mentioned, and then proceeded as follows:—"Messrs Forbes & Co. of Bombay, receive the interest half-yearly of the three notes into which the opposite sum of

32,000 rupees is divided or opposed in the name of each child at 9 per cent. per annum, until they can place it out to more or equal advantage in the funds of the honourable East India Company. I wish these sums to continue accumulating until such progressively shall amount to 8,000*l.* sterling, the expenses of maintaining and educating these children, in the mean time, to be defrayed by me or at my expense. The reason why I have made this separate provision for these three children is, that they may be independent of me in case I should marry and have more children; but in the event of my death without an increase of family, my will will show the manner in which I wish whatever property I may die possessed of to be distributed, including the opposite 32,000 rupees, with its interest. I have paid for a cornetcy for Colin Anderson, jun. in his majesty's nineteenth regiment of light dragoons, on the 29th September 1802: of course, in case of my death, an equal amount of my property, with the interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenour of my will.

"1803, *January* 1. Lodged in the treasury of Bombay of the East India Company 32,000 rupees as a loan at eight per cent., the interest payable in Bombay half yearly, for the sole use and benefit of the under-mentioned children, and in the proportions set down opposite to their respective names.

| | |
|---|---|
| Jane Jarvis Anderson - - - - - | 13,600 |
| Ann Nesbitt Anderson - - - - - | 10,245 |
| Caroline Erskine Anderson - - - - | 8,155 |
| Bombay rupees, | 32,000" |

The testator died in 1804, leaving his children the said Colin Anderson, Ann Nesbitt Anderson, Jane Jarvis Anderson (since deceased), and Caroline Erskine Anderson, the residuary legatees named in his will and codicil; and Charles Forbes proved the will in the prerogative court of Canterbury. Colin Anderson attained the age of twenty-one, and was of the age of thirty years when the first bill was filed on the 26th day of May 1819. In May 1819, Ann Nesbitt married the plaintiff George Jackson, and previously thereto marriage-articles were executed, whereby the plaintiff covenanted to vest in trustees all such moneys as she might be entitled to of the estate of the testator, upon trust to pay the dividends to her for life, then upon trust for the children, as Jackson and wife, or the survivor should appoint; and in default of appointment, in trust for the children of the marriage, with survivorship, and accruer amongst them; and if there were no children, upon trust for such persons as the wife should by her will appoint. The original bill, in which Mrs Jackson, formerly Ann Nesbitt, was joined with her husband as plaintiffs, prayed that the rights of all parties in the residuary estate and effects of the testator might be ascertained, and the share of Ann Nesbitt transferred into the names of the trustees of the marriage-settlement, and that the dividends that had accrued due of her share might be paid to the plaintiff.

Caroline Erskine Anderson, with the approbation of the court, mar-

[Jackson *v.* Forbes.]

ried the defendant J. F. Middleton, and articles of settlement were entered into with the approbation of the Master: the plaintiff and his wife had five children. Jane Jarvis Anderson died an infant unmarried. In Easter term, 1824, the plaintiff and his wife filed their supplemental bill against the Attorney-General, stating the illegitimacy of Colin Anderson the son, and that he had departed this life without leaving any next of kin.

Letters of administration to both Jane and Colin the son were, with the consent of the Attorney-General, granted to the defendant J. Hopton Forbes. Ann Nesbitt died in November 1827, having previously made her will, whereby, pursuant to the power given to her by her settlement, she gave her property to her husband the plaintiff in case her children should not live to attain twenty-one: the plaintiff took administration to his wife's effects.

Mr Roupell and Mr. Garratt, for the plaintiff.

The question in the case is, what interest and rights the four illegitimate children of the testator took in his residuary estate? and we submit that they took an interest for life, or if a greater interest, that it was an interest vested, subject to be divested in the event of their dying without issue; and it is in particular the question with respect to the share of Colin Anderson, one of those children, we contend that he did not take an absolute interest in the fourth part of the estate of the testator, although he attained the age of twenty-one years, and that his share on his death without issue reverted to the common stock. The share of Jane Jarvis fell into the general fund: she died before Colin. In the former part of the will the testator used words which would seem at first to give to his son Colin, on his attaining the age of twenty-one, an absolute interest; but these words followed: "subject to such regulations and legacies as I shall hereafter mention." In the subsequent part of the will he says, "In case of issue, these children are to inherit the share of their parents among them equally; and in case of their dying without issue, to be divided amongst the survivors." The testator has clearly shown his intention to be, that the interest Colin was to take, even in the event of his attaining twenty-one, was an interest subject afterwards to be divested, in the event of his dying without issue. Now the mode of construing an instrument of this sort, where in the will itself there is contained contradictory clauses which can not be reconciled, is, that the last clause shall have effect; and in this case, in the first part of the will the testator seems to have given an absolute interest, and in a subsequent part he appears to have had an intention to qualify it. The rule of construction will give effect to the latter part of the will. The rule is so laid down in Lord Coke's 1st Institute, 112 B.—"Here, by (&c.) is to be understood, as well devises of chattels real or personal, as of freehold and inheritance: also that in one will, where there be divers devises of one thing, the last devise taketh place; *cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.*" There may be a seeming repugnance in this will, and, upon the principle laid down in Coke, the latter part of the will is to prevail. In the case of Sims and Doughty, 5 Ves. 247, a question arose upon there being repugnant clauses in the will. The Master of the Rolls there says, "I know of no rule, but by taking

the subsequent words as an indication of a subsequent intention: the court is in a dilemma, and can not act at all unless they do that."—In Galland v. Leonard, 1 Swanst. 163, the court said, "Undoubtedly, if the successive clauses of a will are irreconcilable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intention." In an early part of the will before the court, in which it is supposed the testator may have given an absolute interest, he has qualified it by saying that it is subject to such regulations and legacies as he should thereafter mention; and the language of the subsequent part of the will limits the interest which the parties are to take. Then there is another question which arises in this case upon the codicil relative to the cornetcy, which the testator had purchased for his son Colin, on which we contend, that the amount of what the testator paid, together with interest from the time he advanced the payment, should also be credited in three parts to the three girls. It should be stated to the court that settlement was made on the marriage of the plaintiff with Ann Nesbitt Anderson: that settlement has not conformed exactly to the testator's intentions; but it is not now intended to raise any question respecting it, the object of the suit being to take the judgment of the court with respect to the interests of these parties under the will, and the events that have happened.

Mr Rose for the Attorney-General.
Sir Charles Wetherell appeared for Mrs Middleton.
Mr Treslove and Mr Millar for other defendants.

The Master of the Rolls. The interest on the 4000 rupees, the price of the cornetcy, must be calculated from the death of the testator and not from the time of payment. I am clearly of opinion that the share of the boy vested at twenty-one, and that the words of the will which apply to the survivorship are necessarily confined to the girls' shares. It is true that if two parts of the will are plainly inconsistent with each other, the court is necessarily driven to adopt the latter part of the will as expressing the real intention of the testator; it must necessarily presume, where there is that inconsistency, that he meant that which he last expressed; but the most rational rule of construction is, that it is never to be inferred, if it can be avoided, that the testator meant to make inconsistent provisions in his will; and the object of the court is to reconcile, if it can, the whole will. Applying that principle to this will, it appears to me to have been the intention of the testator, that the boy on attaining twenty-one should take an absolute interest; but with respect to the daughters, that they should take for life only, and their issue after their deaths. The early part of the will expresses only an intention to give his whole property to these four children, subject to the regulations after mentioned. It is plain, therefore, that he did not mean to give his whole property absolutely to these four children, but that he meant to introduce some qualification of that absolute interest; and you must look, therefore, at the second part of the will in order to see what was the qualification he had in his mind in making the former part of his will. The words are, "As the whole of the estate is to be equally divided amongst the before-mentioned four children or the survivor of them, a regular division must

be made of the estate when each becomes of age or is married." Now, "when each becomes of age or is married," you must apply to that expression the construction *reddendo singula singulis* when the boy comes of age, or when the girls come of age or are married, "and the share of such person is not to be considered as any longer belonging to the public stock, but to the particular person so coming of age, if a boy." The words, therefore, are express that if the particular person so coming of age is a boy then his share is no longer part of the common stock, but becomes his absolute property. Then he introduces words, of which it is difficult to understand the meaning: "Subject, however, to the control of my executors, their heirs and assigns, for nine years, when he will have arrived at years of discretion." What sort of control a court could impose on this absolute vested gift it is very difficult to conceive. The testator has not expressed himself in a manner that would authorize any interference on the part of the court; but the question does not arise, it being admitted that he did attain thirty. "When the girls, or any of them, become of age or get married, I hereby direct that their shares may be settled on themselves during their lives, and on their children in equal proportions after their deaths, that they may not be in the power of their husbands." Here the testator has qualified the interest of the daughters to an interest for life, giving the remainder after the life-interest of the daughters to their children. And he proceeds to state, "should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors." Now, to make the will wholly consistent, this must be the meaning: if those daughters should die without issue, then the share of the daughter so dying without issue is to go amongst the survivors of the four children; and the same idea is to be pursued throughout the remaining expressions, which are to be understood in precisely the same manner. The only circumstance that created the least doubt in my mind upon this construction was this, "the share is to return for the benefit of the survivors of those four children or their families." But here, again, we must consider the construction *reddendo singula singulis* to the boy according to the nature of his original interest, namely, an absolute vested interest; but with respect to the daughters, according to the nature of the interest given in the original shares to the daughters and their families, and would not depend upon the daughter's surviving the person whose share should happen so to devolve to the survivor or survivors. Upon the whole, therefore, I think it very clear here that Colin Anderson was absolutely entitled to the original share, and to the accruing share, and that if he were illegitimate, and died without issue, it necessarily follows that the crown is now entitled.

It is impossible to make this will consistent or rational but by giving the boy a vested interest, and applying this expression with respect to the issue of the girls, and that is done without the least violence whatever: the testator meant that the daughters should take only for their lives, and that they should take it as a provision for their protection against any improper conduct on the part of their husbands, and that after their death it was to go to their children. I must declare that

Colin Anderson took a vested interest in his original share at twenty-one. I am also of opinion, that upon the death of Jane Jarvis, one of the children, he took a vested interest in one third of her share, the other two daughters being then alive, and that the other two thirds of her share went to the other two daughters for their lives only; with remainder to their issue, in the same manner as the will disposes to the daughters of their original shares.

*July* 17.—Mr Roupell and Mr Garratt called his Honour's attention to a point in the minutes which the parties had not been able to settle, as to the rate of interest to be payable on what the testator had laid out in the purchase of a cornetcy for his son Colin. The testator's property bore Indian interest for a time, and at the testator's death it was actually vested in India, and continued there some time afterwards.

The Master of the Rolls inquired how long the property remained in India; but there was no distinct evidence of the time it remained there after the testator's death: it was brought home for the purpose of being divided, and the estate was administered in this country. His Honour declared that he could not, in the absence of evidence, give more than four per cent., the interest of the court. His Honour afterwards added, that he could not intend that if this money had not been applied to the purchase of the cornetcy it necessarily would have been employed in India, and have produced Indian interest.

The minutes of the decree, so far as they refer to the principal points of the case, are as follow:—Declare that, according to the true construction of the testator's will, Jane Jarvis Anderson, Ann Nesbitt Anderson, and Caroline Erskine Anderson, the three residuary legatees, who were girls, were in no event to take more than an interest for their respective lives; but that Colin Anderson, one of the residuary legatees, who was a boy, was to take an absolute vested interest on attaining his age of twenty-one years: declare, that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated, and that the surplus interest, after paying the expenses of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should be eventually entitled thereto: and declare, that the late defendant, Colin Anderson upon attaining his age of twenty-one years, became absolutely entitled to one fourth part of the aggregate fund, and all subsequent interest and accumulation thereof; but in computing such fourth part, he is to be charged with the sum which the testator paid for a cornetcy for him, with interest thereupon from the death of the testator, at the rate of four pounds per cent., according to the direction of the testamentary paper relating thereto: and declare, that the remainder of the aggregate fund, after deducting such the fourth share of the said Colin Anderson, continued, until the death of the said Jane Jarvis Anderson, to be one aggregate fund, out of the interest whereof she and the two other residuary legatees (the late plaintiff Ann Nesbitt Jackson, then Ann Nesbitt Anderson, and the defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson,) were to be maintained and educated; and that the surplus interest thereof, after paying

the expense of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventually be entitled thereto: and declare, that upon the death of the said Jane Jarvis Anderson, under the age of twenty-one years, and without having been married, the said Colin Anderson became further absolutely entitled to one third part of the third share, in which she had a life-interest, of and in the said remaining aggregate fund, and that the residue of such aggregate fund still continued, until the marriage of the said late plaintiff, Ann Nesbitt Jackson, to be one aggregate fund, out of the interest whereof she and the said defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, were to be maintained and educated; and that the surplus interest of such remaining aggregate fund, after paying the expense of such maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventually become entitled thereto: and declare, that upon the marriage of the late plaintiff, Ann Nesbitt Jackson, then Ann Nesbitt Anderson, she became entitled for her life, for her separate use, to the interest of one moiety of the said then remaining aggregate fund; and that the other moiety thereof continued till the marriage of the said defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, to be a trust fund, out of the interest whereof she was entitled to be maintained and educated; and that the surplus of such interest, after paying the expenses of her maintenance and education, was to be invested and added to the principal, so as to form an aggregate fund, for the benefit of the persons eventually entitled thereto: and declare, that on the marriage of the defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, she became entitled for her life, for her separate use, to the interest of the said then remaining aggregate fund: and declare, that on the death of the late plaintiff, Ann Nesbitt Jackson, the share of the testator's residuary estate, to the interest whereof she became entitled for her life as aforesaid, and the subsequent interest and accumulations thereof became, under the trusts of the said will and codicils, divisible, in equal shares, among her surviving children and the legal personal representatives of her deceased children, but subject as to the plaintiff George Jackson's beneficial interest in the shares of his deceased children, as their father and sole next of kin, to such claims, if any, as the surviving children of the late plaintiff, Ann Nesbitt Jackson, may have under her marriage-articles, as to which the court reserves the consideration thereof until after the Master shall have made his report: and declare, that the share and interest which so vested as aforesaid in the said Colin Anderson deceased, with the accumulations thereof, now belong to his Majesty, subject to the payment thereout of the costs and expenses incurred by the said defendant, John Hopton Forbes, in taking out letters of administration to the said Colin Anderson the younger, and Jane Jarvis Anderson *ad litem*. And let the Master inquire how much of the clear residue belongs to his Majesty, and how much to the plaintiff, George Jackson, as administrator, with the will annexed of his late wife, Ann Nesbitt, in respect of the interest and accumulations of the share to which she was entitled for her life, and how much thereof belongs to her surviving children, and the representatives of her deceased children, in respect of the principal of such share, and the interest and accumulations thereof since her

death, and how much thereof belongs to the said defendant, Caroline Erskine Middleton, in respect of the by-gone interest and accumulations of the share to which she is entitled for her life, and how much thereof is the principal of such share.

## Jerningham *v.* Herbert.

1 *Tamlyn*, 103.

A. being entitled to a Scotch heritable bond, devised it with other property.
The heritable bond does not pass, but descends to the heir at law.
It is immaterial that there is also a personal obligation.
The debt still retains its real character as the jus nobilius.
*Westminster Hall*, July 11, 1829.

MRS. ANN FRANCES MIDDLETON, by her will, gave the sum of 30,000*l.*, of which 5,000*l.* was lent by her on the estate of George Johnstone, Esq. on mortgage. A reference having been made to the Master, to inquire what was the nature of this security, he made a report thereon, of which the following is the effect:—

George Grant of Leaston, in the constabulary of Haddington and county of Edinburgh, merchant in London, by his bond bearing date the 5th of August 1779, bound himself, his heirs, executors, and successors, to infeft Mary his wife in an annuity of 500*l.* sterling, to commence at the time of his death or bankruptcy, furth of his lands of Leaston, Plewland Hill, and others therein mentioned. And by an instrument of the same date, the said George Grant enfeoffed his said wife in the said annuity upon his said lands. George Grant sold the lands to George Johnstone; and it was agreed that the latter should retain 10,000*l.* of the purchase-money as a capital to answer the said eventual annuity, and which sum was, by the disposition of the lands, declared to be a real burden or charge thereon; and it was therein recited that Mr George Johnstone should give a personal bond, over and above making it a real burden. The said George Johnstone, by his bond bearing date the 2d day of March 1802, and registered in the books of session 19th day of October 1807, after reciting the said heritable bond, became bound to pay the interest of the said sum of 10,000*l.* to the said George Grant during the joint lives of him and the said Mary Grant, or until she should become entitled to the annuity, and to pay the said capital sum itself to the said George Grant, his heirs or successors, at and upon the decease of the said Mary Grant; which obligation, so far as respected the principal or capital sum, was subsequently renounced and discharged by the said George Grant. George Grant and Mary Grant, by deed executed on the 5th of October 1807, and ratified by her on the same day, conveyed to J. Cassin, G. Smith, and James Bellamy, their heirs, executors, or assigns, the interest of the said sum of 10,000*l.*, and all the right and possession of him George Grant from and after the term of Martinmas 1807, during the joint lives of him and the said Mary Grant, and also the said eventual annuity

of 500*l.* during the life of the said Mary Grant, from the decease or bankruptcy of the said George Grant. George Johnstone, by his heritable bond and disposition in security bearing date the 26th September 1807, registered in the books of the court of session the 23d of October 1807, bound himself to pay to the said Cassin, Smith, and Bellamy, and the survivor of them and his heirs, the sum of 10,000*l.* as principal, within three months after the death of Mary Grant, with interest from her death. He conveyed to them, in real security, the said lands, for the payment of the same sum, and interest, from the death of the said Mary Grant.* These gentlemen were trustees for Robert Foster Grant, Esq.; and by disposition and assignment in April 1809, duly registered in May 1809, they made over to him, his heirs and assigns, the aforesaid eventual annuity of 500*l.*, payable as aforesaid, and the interest of the said principal sum of 10,000*l.* during the joint lives of the said George Grant and Mary Grant, and also the principal sum itself, payable as aforesaid, at the death of the said Mary Grant, and the interest thereof, and the said lands in security.

R. F. Grant, by his disposition and assignment, bearing date the 23d day of December 1809, executed in London, and registered in the books of the court of session in Edinburgh, the 17th February 1810, in consideration of the sum of 10,000*l.* to him paid by the testatrix, gave, granted, alienated, and disposed to the testatrix, and her heirs and assigns, the said annuity of 500*l.* sterling, to which he had right upliftable furth of all and sundry the lands of Leaston and Plewland Hills, and other lands; and he assigned to her generally all his right in the obligation for payment. And the said R. F. Grant did thereby assign, convey, and dispose from him and his heirs and successors, to the testatrix, the interest of the sum of 10,000*l.* from Martinmas 1809, during the joint lives of the said G. Grant and M. Grant, or until she became entitled to the annuity, together with the security for the payment thereof, and the bond of George Johnstone surrogating and substituting the testatrix in his right and place. And R. F. Grant did grant, alienate, and dispose to the testatrix, her heirs and assigns, heritably all the said lands, and all the right which he had thereto, and that in real security for the payment of the said principal sum of 10,000*l.* within three months after the decease of the said Mary Grant, and interest from her death. And R. F. Grant bound himself to enfeoff the testatrix of the said lands by double enfeoffments; and for effecting the enfeoffment, he assigned to the testatrix the said sum of 10,000*l.* and interest, together with the said heritable bond and disposition in security granted by the said George Johnstone, and the instrument of seisin following thereon, substituting the testatrix in his place; and she was afterwards duly enfeoffed. The said George Johnstone, then residing in Hanover Square, in the county of Middlesex, executed, in London, a bond or obligation, bearing date the 31st March 1810, unto the testatrix, to secure to her the payment of the interest of the sum of 10,000*l.*

* The following passage occurs in this instrument :—

"And further declaring that the aforesaid personal obligation, and the said conveyance in security, were and should be deemed consistent; and it should be competent to the said persons to operate payment by virtue either of the said securities or both, and by personal and real diligence on either or both, without innovation or confusion of rights."

half-yearly, during the joint lives of the said George Grant and Mary Grant, or until the right of the said Mary Grant to the said annuity, secured by the said bond of 2d March 1802, took place. And in the margin of the bond is the following note or memorandum signed by the testatrix:—"15th August 1814. Received of the Countess St. Antonio, as the executrix of the late George Johnstone, Esq., the sum of 5,000*l.* in part payment and discharge of this bond; and the further sum of 107*l.* 5*s.*, being for all interest on the 10,000*l.* to this 15th August 1814, and for which I have given also a stamp receipt.

(Signed) "A. F. Middleton."

Upon these facts the Master found that the sum of 5,000*l.*, part of the said capital sum of 10,000*l.*, was paid off to the testatrix in her lifetime, by the Countess St. Antonio, the executrix of the said George Johnstone, in part discharge of the securities of the same; and that the interest on the remaining 5,000*l.* was paid to the said testatrix or her committees by the countess, to within one quarter of the time of her death. And that, upon due consideration of the said instrument, and considering the said sum of 5,000*l.* remaining due thereupon to the testatrix,—was, by the law of Scotland, real estate belonging to the testatrix at the time of her death, and that the same was secured by the several instruments before stated; and that as the same, by the law of Scotland, did not pass by the will or codicils of the testatrix, the same was then vested in the defendant, Hastings Nathaniel Middleton, as the heir at law of the testatrix, for his own use and benefit. When this cause came on for further directions, it was referred back to the Master to inquire and certify, "whether, by the law of Scotland, the testatrix, either in her own name or in the names of the obligees, had a right of personal action against the obligor or his executrix, either in respect of the bond bearing date the 2d day of March 1802, or the bond bearing date the 26th day of September 1807, and to inquire whether George Grant and Mary his wife were living at the time of the testatrix's death, and if she survived her husband, and if now living, or when she died."

The Master reported that by the law of Scotland the testatrix either in her own name or in the name of the obligees, had such right of personal action in respect of either bond. That report was made upon the following opinion of John Hope, Esq., the Solicitor-General of Scotland, and Mr. Moncrief of the Scotch bar:—

"There can be no doubt that the party in the right of an heritable bond has a right of personal action against the debtor or grantor of the bond and his executors and representatives, for payment of the sum for which the heritable security is granted. The real or heritable security is added, for the safety of the creditor, to the personal obligation of the debtor; and when a debt is so secured, important consequences follow in regard to the succession of the creditor's interest in the bond. But the circumstance that the creditor has obtained real security for the payment of his debt in no degree alters the right to demand payment in a personal action against the debtor or his representatives."

The Master also reported that it appeared by an affidavit sworn on the 18th December 1828, that the said George Grant was then alive; that the testatrix died on the 3d day of November 1823, and Mary Grant on the 5th of December 1823.

[Jerningham *v.* Herbert.]

Mr Treslove and Mr Bird, for the heir at law. It seems by the opinion of the gentlemen of the Scotch bar that a personal action lies upon every heritable bond; the Master has found that it was real estate, and descended to the heir at law, with a right to personal action. In the case of "Willock *v.* Ouchterlony," in the House of Peers, 1772, cited in "Glover *v.* Strothoff," 2 B. C. C. 33, it was affirmed by the decree of the house that heritable bonds could not pass unless they were disposed of *inter vivos* by the proper deed of disposition, according to the laws of Scotland; but the case to be relied on is that of "Johnstone *v.* Baker," reported in a note to the case of the Duchess of Buccleugh *v.* Hoare, 4 Madd. 474. In that case a heritable bond was given, to a moiety of which the testator therein had become entitled, and he by his will devised all his real and personal estate upon the trusts therein mentioned. And he directed that all his property and securities for money in Scotland should, for the purposes of his will, be considered as personal estate, and passed to his trustees as far as he could by his will affect the same, as if the same were his personal estate in England. A case was laid before the Lord Advocate of Scotland, who thereupon stated his opinion to be, that the will of the testator was ineffectual for conveying the heritable debt in question; but that the same did, on the death of the testator, descend to his heir at law. The Master thereupon reported, that the heritable bond did not pass by the will, but descended to his heir at law. And Sir William Grant, Master of the Rolls, decreed accordingly. In that case also there was a right of personal action. The only case against us appears to be that of the Duchess of Buccleugh *v.* Hoare. In that case an English bond was given and the Scotch securities were only collateral; and, under the special circumstances, it was there decided that the debt was personal property. That is not the case now before the court; and the bond, we conceive, descends to the heir at law. The third bond is an English bond; but that is only a bond securing the interest.

Mr Pepys for the administrators.

If the Scotch bond were given originally, then it is real estate, but if collaterally, it is not so. All the cases decide that heritable bonds as such do not pass by an English will. The case of Johnstone *v.* Baker, decided by Sir William Grant, related to a purchase of a heritable bond; but we are the purchasers of the 10,000*l.* Grant was unable to make a title to the estate to the extent of the annuity of 500*l.* a year granted to his wife, whereupon Johnstone the purchaser reserved 10,000*l.* of the purchase money, and gave a bond.

Mr Treslove.

It was provided by the conveyance itself that the 10,000*l.* should remain in the hands of Johnstone as a real burden. Mrs Middleton took an assignment of it by Scotch securities.

Mr Pepys resumed.

The bond in 1802 was a bond to pay the 10,000*l.*: it is a mere debt and not an interest in land. In 1807 George Grant assigned the 10,000*l.* to trustees for R. F. Grant; and in 1810 the transaction took

place between the testatrix and R. F. Grant. Under which class of cases does this case fall? In one case it does not pass by will; in the other case, where the Scotch security is collateral to the debt, then it does. This being, I submit, within the case of the Duchess of Buccleugh and Hoare, is part of the personal estate, and passed by the will.

Mr Richards followed.

It has been decided that when an English security is given, it passes as personal estate. Mr Johnstone's executrix, the Countess of St. Antonio, paid off a part of the bond, and in the margin is written a receipt for 5,000*l.* in part. Now if the Countess paid off a part of this bond as executrix, there was personal liability; and having paid a portion, could the Countess have justified a refusal to pay the remainder? Mr Johnstone and his executrix made themselves personally liable; and where there is that responsibility, it comes within the case of the Duchess of Buccleugh and Hoare.

Mr Rose and Mr Lynch, for the legatees. The Master has certified that there was a right of personal action for the money against Mr Johnstone. The security is a personal obligation, adding only the incident of a Scotch security and the enfeoffment of a heritable property; it is a personal obligation with a security binding his heir: in the case of Johnstone *v.* Baker, the parties were domiciled in Scotland. We are entitled to consider this as personal property of Mrs Middleton, and to deal with it according to her will.

Mr Treslove. This is the case of a man who does not pay the purchase money, and that in England is a real burthen upon the land. A bond to a man, his heirs, and successors must of necessity be reality: it is similar to a rent-charge in this country.

The Master of the Rolls. (After adverting to the Bond of 1779, and the assignment to trustees for Mr Robert Foster Grant), Mr George Johnstone executed a new heritable bond to the trustees for Robert Foster Grant, and in that new heritable bond he made a real burthen on the estate, of the 10,000*l.* to be paid within a certain term after Mrs Grant's death; but he did not in that security make it a real burthen upon the estate, that the interest should be paid during the joint lives of Mr and Mrs Grant.

This heritable bond, like the former one, contained also the personal obligation of Mr Johnstone.

By the disposition and assignation, which bears date two years afterwards, namely, the 3d of May 1809, those trustees assigned to Mr Robert Foster Grant their *cestui que trust*, the benefit of all the securities, Mr Robert Foster Grant being thus entitled to all these securities, he, by a deed dated the 23d of December 1809, assigned them to the late Mrs Middleton; and she, therefore, stood precisely in the same situation as the trustees of Mr Robert Foster Grant had. Mr Johnstone executed a bond to Mrs Middleton, bearing date 31st March 1810, whereby Mr Johnstone engaged to pay to Mrs Middleton the interest of the sum of 10,000*l.* half-yearly during the joint lives of the said George Grant and Mary Grant his wife, or until the right of the

said Mary Grant to the said annuity, secured by the said bond of the 2d March 1802, took place. This was an English bond; and of consequence all the interest that she derived under this English bond would necessarily pass by her will.

(His Honour here referred to the opinion of the Solicitor-General of Scotland, and Mr Moncrief, who is now a judge of the court of session.)

I have looked into the Scotch law upon the subject, and I now entertain a clear opinion upon it. Heritable bonds, it seems, usually contain, not only a charge making the same a real burthen upon the estate, but also a personal obligation. The question to be considered is, Whether this personal obligation alters the nature of the property, so as to give it to the personal representative, in the place of its passing as a heritable bond to the heir at law? Now upon that point there is no doubt upon examining the Scotch authorities. It is there expressly stated, especially in Mr Erskine's Institutes, that if there be a personal obligation supervening, as the term is in the Scotch law, the heritable bond, that the heritable bond will carry with it the personal right, as being *jus nobilius* and, consequently, it still continues a heritable bond, and will descend to the heir,* and will not pass by an English will. I am, therefore, of opinion, that, except as regards the interest secured by Mr Johnstone's bond to Mrs Middleton, of the 31st March 1810, Mrs Middleton's will does not effect this property; and that the right to the heritable bond descends to the heir.

* Though moveable sums are rendered heritable by the creditor's securing them on land, yet an heritable debt is not changed into moveable by an accessory moveable security : *ex. gr.*, a gift of single escheat, or by a second moveable bond, corroborating the first heritable one, (Pr. Falc. 43.); because the supervening security is not only an accessory to the heritable debt, but it is the weaker right, which, therefore, ought not to draw the *jus nobilius* after it. And, indeed, there is no ground to presume in such case an intention in the creditor to alter the condition of the debt; for his obvious and only meaning is to secure the payment of it. Neither does the demand of payment, by a creditor in an heritable debt, though made judicially, afford any presumption of an intention to change the nature of it to moveable, but rather to employ his money, when recovered from the present debtor, upon another heritable security, more to his liking, or perhaps on a purchase of land.—Ersk. Inst. 186.

## Burlton and others, assignees, &c. *v.* Wall, clerk.

1 *Tamlyn*, 113.

A commission was issued against two partners, subsequently a commission was issued against one of them and three other persons: this latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance.

*Rolls*, July 27, 1829.

JOHN MORRIS being seised in fee of the lands in question, a commission of bankrupt, bearing date the 30th of March 1826, was issued against Thomas Coleman, the said John Morris, John Beebee Morris, and Thomas Morris, bankers, dealers, and chapmen, on which they were declared bankrupts, and the plaintiffs were chosen assignees. In that character the plaintiffs, in July 1827, contracted to sell the lands to the defendant.

Previously to this commission, and on the 29th March 1826, a commission was issued against Thomas Coleman and Edward Wellings, under which they were declared bankrupts.

On the 16th of April 1828, Thomas Coleman and the plaintiffs presented a petition to the Lord Chancellor in the matters of the two bankruptcies, praying that the commission against Thomas Coleman, John Morris, John Beebee Morris, and Thomas Morris, might be superseded as against Thomas Coleman, without effecting the validity of such commission as to either of the other bankrupts, or the certificate of either of them. On the 10th May 1828, this petition came on to be heard, when the Vice-Chancellor superseded the commission as against Thomas Coleman, his estate and effects accordingly, without prejudice to the validity of the commission as to the others, or their certificates; and the proofs of the debts under that commission against the separate estate of Thomas Coleman were ordered to be transferred to the commission issued against Thomas Coleman and Edward Wellings, and to stand part thereof. The bill stated the preceding facts, and prayed for specific performance.

The defendant, by his answer, said, that he was ready to perform the agreement upon having a good title made to him; but he had not hitherto performed the same on account of the doubts which he was advised existed with respect to the complainant's title, especially as concerned the validity of the commission of the 30th of March 1826, as against the said John Morris, John Beebee Morris, and Thomas Morris, and their estate and effects, regard being had to the previous existence of the commission of the 29th March 1826, notwithstanding the said order of *supersedeas*.

The usual reference was made to the Master, who reported that a good title could be made.

[Burlton *v.* Wall.]

To that report the defendant excepted. The exception, and a petition of the plaintiffs for confirming the Master's report, came on to be heard this day.

Mr Bickersteth and Mr Wigram. Here are two commissions against Coleman. The second commission was void from the beginning. The purchaser is a willing one, yet it is the duty of his counsel to show, that the title is not a good one. A second commission, whilst the former is subsisting, is void, *Ex parte* Bullen, 1 Rose, 136; and *Ex parte* Thompson, 1 Rose, 285. In the case of *Ex parte* Crew, 16 Ves. 236, the Lord Chancellor Eldon held, that if a joint commission issue against persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity, one of the parties being already a bankrupt under a prior commission against him. Another question is, can any thing subsequently done do away with the effect? *Re* Coleman, 1 Montague & M'Arthur, 15. It has been established in a case at law, that a certificate under a second commission is not an answer to an action, Till *v.* Wilson, 7 Barn. & Cress. 684, and and see *Ex parte* Brown, 1 V. & B. 60; and that case was decided since the passing of the last bankrupt act, 6 G. 4, c. 16, s. 16. The sixteenth section of that act only meant that where a commission issued against partners or others being valid, the court might supersede it as to one, leaving it unaffected as against the others; those others being persons against whom a commission might originally have issued. If this be an invalid commission the assignees have no power to convey.

Mr Rose and Mr Beames. The other side contend that the second commission was void, and that nothing could be subsequently done to make it good: but if that be law, Lord Hardwicke and Lord Eldon must have mistaken the law; for they frequently superseded the first, when a separate commission, in order to let in a second, being a joint commission. A commission of bankrupt is in the nature of an execution at law. In *Ex parte* Rawson, 1 V. & B. 160, Lord Eldon gave effect to a second joint commission; for whatever may be the case at law, the Chancellor sitting in bankruptcy will do what is most necessary to effect the purposes of justice. If the proposition be right, that a second commission is void, then no *supersedeas* of the first could establish it; but it was decided in *Ex parte* Bygrave, 2 Glyn & J. 391, that a joint commission against two should be superseded as to one, and that was a virtual decision that the commission was good as to the other. In *Ex parte* Pryce, 2 Glyn & J. 161, Lord Eldon decided that the commissioners ought to proceed under the several commissions, since it was unknown to them which would be ultimately available.

With respect to the case of Till *v.* Wilson the sixteenth section of the last bankrupt act was not adverted to, and Lord Tenterden there said, "We are not called upon to decide what will be the effect of superseding the first commission; it is sufficient for the present case to say, that upon the authorities and opinions referred to, we are of opinion that the second commission is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission."

A second commission is void only by reason of the existence of the

first commission; on the first being superseded, the second becomes good, and, therefore, this exception must be disallowed.

Mr Bickersteth in reply. The question here is, can the plaintiffs make a valid legal title? The Lord Chancellor may direct the proceedings of a previous commission to be impounded, and a subsequent commission to proceed in. And if the certificate of the bankrupt were questioned at law, the Lord Chancellor might interfere by injunction to protect the bankrupt; but that is a consideration different from what should govern the court on the present occasion. The plaintiff is entitled to a legal title, and is not bound to take a title which can only be protected by injunction. The second commission is invalid, and no subsequent act can establish it. The first commission is going on, and therefore the proceedings can not be impounded.

*July* 28.—The Master of the Rolls. I am of opinion that I must make a decree for specific performance of the contract. The argument is, that the sixteenth section of the act of 6 G. 4, was intended only to apply to cases of valid commissions, and that it was not meant to apply to cases where the commission was invalid, because a prior commission had issued against one of the bankrupts. Now, if I were to give any opinion on that point, I should say that the reason of that provision in the act was for the very purpose of giving validity to the commission, which, in its origin was not valid, by enabling the Lord Chancellor to supersede the commission as to one person; and therefore I am far from adopting the argument: but, however, that might be, I should find a very great difficulty here in refusing this specific performance, for the objection is actually removed by the Vice-Chancellor's order under this very commission, for he superseded this commission as far as it regards Coleman, and the commission therefore is a good commission, not only in equity but at law. The argument used on the part of the purchaser is, that the Vice-Chancellor had no authority to do this; that the act did not apply to such a case; but I never could determine that the Vice-Chancellor had committed an error: it would in fact be a re-hearing of the Vice-Chancellor's order, and I should in such case direct the party to go to the Lord Chancellor if I entertained any doubt about it. I have no authority to reverse the Vice-Chancellor's order to supersede; and, therefore, if my opinion were other than it is, I could not decide in favour of the exception; all that I could do would be to send it to the Lord Chancellor; but my opinion entirely concurs with the Vice-Chancellor. I must, therefore, decree a specific performance, and indeed without any doubt upon the question, but without costs.

Exceptions overruled, and specific performance of the agreement, without costs, decreed.

Reg. Lib. A. 1828, fo. 2243.

**Between James Haughton Langston, plaintiff; and Sir Charles Morice Pole, Bart., Haughton Farmer Okeover, Maria Sarah Langston, Charles Barter the elder and Elizabeth Catherine his wife, and Charles Barter the younger, an infant, by his guardian, defendants.**

1 *Tamlyn*, 119.

J. L., by his will, devised his manors to trustees upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees to preserve contingent remainders; with remainder to the *second* and other younger sons of J. H. L. in tail male.

There was no limitation to the first son of J. H. L., but the declaration of the trust of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then J. H. L. might raise money for the portion of younger sons or daughters:

Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father.

*Rolls*, July 28, 1829.

THIS suit was instituted to decide a question on the will of John Langston of Sarsden House, in the county of Oxford, Esquire, bearing date the 28th July 1801, whereby he gave all his manors and lands unto and to the use of trustees upon trust, so soon as his son (the plaintiff) should attain twenty-one years, to convey, settle, and assure the same as follows:—To the use of the plaintiff and assigns for life; remainder to trustees, to be named in the settlement, to preserve contingent remainders; with remainder to the use of the *second*, third, fourth, fifth, *and every other son* of the plaintiff in tail male in succession; with remainder to testator's second and other sons successively in tail male; with remainder to trustees for 500 years, upon the trusts thereinafter mentioned; with remainder to the plaintiff's daughters in succession in tail general; with remainder to trustees for ninety-nine years; with remainder to testator's eldest daughter in strict settlement, and divers remainders over. The trusts of the terms of 500 years and 99 years were declared as hereafter stated in the case laid before the judges of the court of common pleas. And the trustees were directed to give in the settlement similar powers, if any of his daughters should become tenants for life, to raise portions for their younger children. And the bill alleged that it was the testator's intention that his will should contain a direction that the settlement directed by his will to be made should contain a limitation to the plaintiff's first son in tail male, immediately after the limitation to trustees, during the life of the plaintiff, to preserve contingent remainders, and immediately before the limitation to the second son of the plaintiff; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made. And in pursuance of such instructions, a draft of his will was accordingly

prepared; and such draft contained a direction that such a limitation should be inserted in the will, but in the engrossment of the will executed by the testator such direction was omitted to be inserted by the mistake or carelessness of the person who engrossed the will from the draft; the plaintiff, however, submitted that the will contained within itself sufficient evidence of the testator's intention being that the settlement so directed to be made as aforesaid should contain such a limitation as before mentioned in favour of the plaintiff's eldest son in tail male.

The bill prayed that the will and codicils might be established, and the trusts thereof, so far as respected the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estate of the testator devised to the defendants Sir C. M. Pole and H. F. Okeover, and their late deceased co-trustee, might be carried into execution by a settlement and conveyance to be made by the defendants Sir Charles Morice Pole and Haughton Farmer Okeover of the same manors, messuages, lands, tenements, hereditaments, and real estate, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisions, and declarations, to, upon, for, with, under, and subject to which the same were by the will directed to be settled and conveyed, or as near thereto as the deaths of persons, or the circumstances of the case, would permit; and especially that in making such settlement and conveyance, a limitation might be inserted therein whereby the said manors, messuages, lands, tenements, hereditaments, and real estate might be limited, settled, and assured to the use of the plaintiff's first son in tail male in remainder, immediately after the limitation to the use of trustees during the life of plaintiff, to preserve contingent remainders, and immediately before the limitation to the use of the plaintiff's second son in tail male.

Sir Charles Morice Pole, Bart. and Haughton Farmer Okeover, by their answers, said they believed that it was the testator's intention that his will should contain a direction that the settlement so directed to be made as in the bill mentioned should contain such limitation in favour of the eldest son of the plaintiff in tail male, and believed that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such limitation in the settlement so directed to be made; and that, in pursuance of such instructions, a draft of a will was accordingly prepared, and that such draft contained a direction that such a limitation should be inserted in the settlement so directed to be made; and these defendants believed that in the engrossment of the will executed by the testator such direction was omitted to be inserted by the mistake or carelessness of the person who engrossed the will from the draft. They further said, they had been advised and believed that the will contained within itself evidence of the testator's intention being that the settlement so directed to be made should contain such a limitation in favour of the plaintiff's eldest son as in the bill mentioned, but they submitted the same to the opinion of the court.

The other defendants, Maria Sarah Langston, a tenant for life in remainder, Charles Barter, and Elizabeth Catherine his wife, another tenant for life in remainder, and Charles Barter the younger, the infant, first tenant in tail in remainder, by his father and guardian, stated in their answers to the same effect.

[Langston *v.* Pole.]

This cause came on to be heard before the Master of the Rolls on the 23d day of February 1826.

Mr Shadwell and Mr Atherley, for the plaintiff.
Mr Horne and Mr Wray, for the defendants, tenants for life in remainder, and for the first tenant in tail in remainder.
Mr Purvis for defendants, the trustees.

Lord GIFFORD, then MASTER OF THE ROLLS, made an order that a case be made out for the opinion of his Majesty's justices of the Court of King's Bench; and it was ordered that the question be, "whether Henry Langston, the first son of the testator's son James Haughton Langston, takes any estate under the said testator's will?" And all proper facts necessary to bring the matters into question were to be stated in the said case. And his lordship also ordered that it be referred to the Master in rotation to settle the case, if the parties differed about the same. And the justices were to be attended with the case.

In pursuance of this order the following case was made:—

"John Langston, late of Sarsden House, Oxfordshire, Esquire, now deceased, by his will, dated 28th July 1801, gave and devised all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes, and hereditaments in the counties of Oxford and Middlesex, or elsewhere in England, with their appurtenances (except as therein mentioned,) unto and to the use of his son James Haughton Langston, and his assigns during his life, without impeachment of waste, with remainder to the use of trustees and their heirs during the life of the said James Haughton Langston, in trust to preserve contingent remainders; with remainder to the use of the *second*, third, fourth, fifth, and all and every other the son and sons of his (the said testator's) said son James Haughton Langston, lawfully to be begotten, severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; with remainder to his testator's second and other sons successively in tail male; with remainder to the use of other trustees for the term of 500 years upon certain trusts thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of his said son James Haughton Langston successively in tail general; with remainder to the use of other trustees for the term of ninety-nine years upon the trusts thereinafter mentioned, with remainder to the use of testator's eldest daughter, Maria Sarah Langston, and her assigns for life, without impeachment of wastes; with remainder to the use of trustees during the life of the said Maria Sarah Langston, upon trust to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator's said daughter successively in tail male; with remainder to other trustees for the

term of 600 years upon the trusts thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said M. S. Langston successively in tail general; with remainder to the use of the testator's daughter, Elizabeth Catherine Langston, and her assigns for life, without impeachment of waste; with remainder to the said trustees during the life of the said Elizabeth Catherine Langston, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said Elizabeth Catherine Langston successively in tail male; with remainder to the use of other trustees for the term of 700 years, upon the trusts thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said E. C. Langston, lawfully begotten successively in tail general; with remainder to the use of the testator's daughter, Caroline Langston, and her assigns for life, without impeachment of waste; with remainder to the use of trustees during the life of the said Caroline Langston, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other son and sons of the said Caroline Langston, successively in tail male; with remainder to the use of other trustees for the term of 800 years, upon the trusts thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said Caroline Langston, successively in tail general; with remainder to the use of the testator's daughter, Agatha Maria Sophia Langston, and her assigns for life, without impeachment of waste; with remainder to the use of the said trustees to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said A. M. S. Langston successively in tail male; with remainder to the use of other trustees for the term of 900 years, upon the trusts thereinafter mentioned; with remainder to the use of the first second, third, fourth, fifth, and all and every other the daughter and daughters of the said A. M. S. Langston successively in tail general; with remainder to the use of testator's daughter, Henrietta Maria Langston, and her assigns for life, without impeachment of waste; with remainder to the said trustees for the life of the said H. M. Langston, to preserve contingent uses; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the said H. M. Langston successively in tail male; with remainder to the use of other trustees for the term of 1000 years, upon the trusts thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said H. M. Langston successively in tail general; with remainder to the said testator's sixth and other daughters thereafter to be born successively in tail general; with remainder to the use of other trustees for the term of 1500 years, upon the trusts thereinafter mentioned; with remainder to the use of Sarah, the wife of Peter Cazalet, Esq. in fee. And said testator did by his said will declare, that the said term of 500 years was upon trust that the trustees thereof *in case there should be no son of the body of his said son James Haughton Langston*, should by mortgage or sale of the premises comprised in said term, raise money for additional portions and

for maintenance as therein mentioned. And said testator did by his said will declare, that the said term of ninety-nine years was upon trust that the trustees thereof, *in case there should be no son of the body of his said son James Haughton Langston*, should levy and raise such sum and sums of money for portions as therein mentioned. And said testator did by his said will declare, that the said term of 600 years was upon trust that the trustees thereof *in case there should be no son of the body of his* (*said testator's*) *said son James H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 700 years was upon trust that the trustees thereof, in *case there should be no son or daughter of the said J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And the said testator did, by his said will, declare that the said term of 800 years was upon trust, that the trustees thereof, *in case there should be no son of his* (*testator's*) *said son J. H. Langston*, should raise such sum or sums of money for portions as therein mentioned. And said testator did, by his said will, declare that the said term of 900 years was upon trust, that the trustees thereof, *in case there should be no son of his* (*said testator's*) *said son J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And the said testator did declare, that the said term of 1000 years was upon trust, that the trustees thereof, *in case there should be no son of the testator's said son J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And said testator did, by his said will, declare that the said term of 1500 years was upon trust, that the trustees thereof, *in case there should be no son of the testator's said son J. H. Langston*, should levy and raise such sum and sums of money as therein mentioned, for the purposes therein also mentioned. And in the said testator's will is contained a power or proviso, authorizing his, the said testator's, said son J. H. Langston, from time to time during his life, *in case there should be any child or children of his, the said J. H. Langston's body lawfully begotten, other than and except an eldest or only son*, to charge portions as therein mentioned. And in said will is contained a proviso, that *in case the testator's said son, James Haughton Langston, should die under the age of twenty-one years, and there should be no son or daughter of his body living at his decease; or being such, if all such sons should die under twenty-one years of age*, and all such daughters should die under that age and unmarried, then the trustees of the said will should be possessed of certain stocks or funds therein mentioned, upon the trusts therein contained.

The said John Langston, the testator departed this life in February 1812, leaving the said James Haughton Langston, his only son and heir at law, (then a minor,) and several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in December 1811, but none of them making the least variation, or in any manner affecting the above-mentioned limitations of his real estates.

The said James H. Langston attained the age of twenty-one years in May 1817, and has since that time intermarried, and has issue by his wife two sons, viz. "*Henry Langston, his eldest and first born son*, and Edward Langston his second son."

In Easter term 1827 the case was argued before his Majesty's jus-

tices of the court of King's Bench, by Mr Shadwell, for the plaintiff and Mr Horne, for the defendants; and they (after having considered the same) certified that they were of opinion that the said Henry Langston the first son of the said James Haughton Langston, did not take any estate under the said will.

After this certificate of the judge of the King's Bench, the cause came on to be heard before Sir John Leach, who had then become Master of the Rolls, on the 18th March 1828, Mr Pepys and Mr Knight, for the plaintiff; Mr Horne and Mr Way, for the defendants, except the trustees; Mr Purvis, for the trustees. His Honour directed a case to be made for the opinion of his Majesty's justices of the court of Common Pleas; and it was ordered that the question should be, "whether Henry Langston, the first son of the testator's son James Haughton Langston, takes any *and what* estate under the said testator's will?"

James H. Langston *had not in fact any sons, and the statement that he had sons was made in both cases, in order to raise the question at law.*

A case was accordingly stated, which set forth the will much more fully than it was stated in the case laid before the court of King's Bench; to insert it here would perhaps be considered unnecessary, and therefore only some of the amplifications will be noticed.

This case thus begins:—"John Langston, Esquire, was at the time of making his will hereinafter mentioned, and at his death, seised in fee simple of divers manors, messuages, lands, tenements, and hereditaments, situate in the counties of Oxford and Middlesex, and duly made and published his last will and testament in writing, bearing date the 28th July 1801, which was executed and attested in the manner by law required to pass freehold estates by devise; and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the several counties of Oxford and Middlesex, or elsewhere in England, except his shares in the New River Company, unto John Pollexfen Bastard, Esquire, John Williams Hope, Esquire, and Charles Morice Pole, Esquire, (now Sir C. M. Pole, Bart.) their heirs and assigns, to the uses after mentioned (that is to say) to the use of the said testator's son the said plaintiff James Haughton Langston, for and during the term of his natural life, without impeachment of waste;" with remainder to the uses stated in the former case, set out much more fully.

In this case the trusts of the several terms of years limited by the will are set out so much more extensively than they were in the former case, that it has been deemed necessary to make some extracts, first with regard to the term of 500 years; "and the said testator by his said will did declare that as for and concerning the said term of 500 years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust that in case there *be no son of him the said plaintiff*, James Haughton Langston, nor *no future son of his the said testator's own body, or there being any such son or sons, if he and they should all die without issue male before any of them should attain the age of twenty-one years*, and there should be two or more daughters of the body of his the said testator's said son, the said plaintiff J. H. Lang-

ston, then they the said trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should after the decease of his (the said testator's) said son, the said plaintiff *James H. Langston, and such failure of issue male of his body* and of his the said testator's own body as aforesaid, by mortgage or sale or other disposition of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (other than and besides an eldest or only daughter) as thereinafter mentioned (that is to say) [In trust to raise portions for daughters as therein mentioned] and containing also the following passage :—"But nevertheless the payment of the same portion or portions shall be postponed until the end of twelve calendar months next after the decease of him my said son *and failure of issue male of his body* and my body as aforesaid; and then the portion or portions shall be payable with interest for the same, after the rate of 4*l.* by the year for each sum of 100*l.* from the time of the commencement of the said term of 500 years in possession."

The trusts of the term of ninety-nine years were declared to be, that in case there should be *no son or daughter of the body of the plaintiff, nor no future son of testator's body*, or there being any such sons or daughters, the sons should die without issue male, and the daughters without issue before they attained their ages of twenty-one years, *then after the decease of the plaintiff and failure of issue as aforesaid*, to raise sums for the benefit of testator's youngest daughters therein named, and as therein mentioned. The trusts of the term of 600 years are to be carried into execution in the same events with this in addition ; "and in case there should be no son of the body of his daughter Maria Sarah Langston, or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of his daughter M. S. Langston, then *after the decease of the plaintiff and M. S. Langston, and such issue of failure as last aforesaid*, to raise portions for her daughters as therein mentioned."

The provision for younger sons, as set forth in the second case, is in the following words :—

"And the said testator thereby also provided and directed, that it should be lawful for the said plaintiff from time to time during his natural life, in case there should be any child or children of his body lawfully begotten *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published in the presence of and attested by three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and heriditaments thereinbefore devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for *the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters of the body of him the said plaintiff, lawfully, to*

*be begotten*, born in his lifetime, or within due time after his decease, to be paid and payable unto and to vest in such younger son or sons, or daughter or daughters respectively, at such time or times and in such shares and proportions, with such clauses of survivorship, and in such manner as he the said plaintiff should by such deed or deeds, instrument or instruments in writing, or last will and testament, to be executed and attested as aforesaid, direct, limit, and appoint. And also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money yearly or otherwise, as he should think fit, for the maintenance of *such younger son or sons, or daughter or daughters*, from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of 4*l.* per cent. per annum."

In Michaelmas term 1828, this case was argued before his Majesty's justices of the court of Common Pleas, by Mr Serjeant Taddy for the plaintiff, and Mr Serjeant Wilde for the defendants, and those judges (after having considered the same) certified that they were of opinion, that the said Henry Langston, the first son of the said testator's son *James Haughton Langston, took an estate in tail male under the said will expectant on the decease of his father the said* James Haughton Langston.

*July* 28.—The cause now coming on to be heard on further directions.

Mr Bickersteth and Mr Wray for the defendants, except the trustees. The courts of King's Bench and Common Pleas have found differently. The question is on the devise to the testator's son for life, with remainder to that son's second and other sons, wholly omitting the first son. The testator then goes on to provide for his daughters by terms of years, and that provision is made in certain events; and by his will he declares the trusts of the term to be, that in case there shall be no son of the plaintiff, nor no future son of his own body, or there being any such son or sons, if he and they shall all die without issue male before any of them shall attain the age of twenty-one years, and there shall be two or more daughters of the body of the plaintiff, then certain sums shall be raised; so that he has made a provision for the plaintiff's daughters on failure of issue male. The argument on the other side is, that the testator could not have meant to exclude the eldest son. Afterwards there is a provision for the children other than the eldest son. Now, these are the clauses in the will by which it will be attempted to make out that the eldest son was intended to be included in the limitation. But can the court consider the latter clauses so repugnant to the first limitation, that it will introduce a limitation to the eldest son? The proviso for the daughters is consistent with no benefit to the eldest son. It is nothing that no other provision is made for the eldest son, the will must be construed by itself. The court of King's Bench has held that the eldest son took nothing: the court of Common Pleas has held the contrary: it rests with this court to decide. The words used by a testator are the words on which alone the court can act; it can not enter into conjecture.

Mr Pepys and Mr Knight, for the plaintiff.
Mr Purvis, for the trustees.

[Langston *v.* Pole.]

The MASTER OF THE ROLLS. Whatever may be my opinion on the subject, I shall certainly come to a decision, in order that the cause may be carried to the House of Lords. I shall, therefore, determine in favour of the decision of the court of Common Pleas; but my opinion is, that that court came to a right conclusion. The whole will must be looked through in order to discover the sense of the testator; and the question is, whether the testator or the drawer of the will did not by mere mistake omit the word "*first*." I am of opinion that it was omitted by mistake. How is the provision for the daughters, in case there should be no issue male, consistent with no limitation to the first son? It is manifest, that the testator did not mean to exclude the first son. Then follows another clause, but a stronger inference can not be drawn. The testator, contemplating there might be several sons, gave his son a power to provide for his younger sons; yet, according to the argument, the second and other younger sons were to take the whole estate.

My opinion, therefore, is in favour of the decision of the court of Common Pleas.

The will must be decided on according to the sum of the expression throughout it.

Decree, a conveyance to be executed, whereby an estate tail male is to be limited to the first son of the plaintiff, after the limitation to the trustees during the life of the plaintiff to preserve contingent remainders.

Reg. Lib. B. 1828. fol. 2069.

## Christopher Topham *v.* Ann Constantine.

1 *Tamlyn*, 135.

The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to.

Where an estate has been sold to a person who has since died, the court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay.

*Rolls*, July 28, 1829.

THIS was a bill filed by the plaintiff against the defendant, as administratrix of Mr Richard Constantine, for the specific performance of an agreement for sale of an estate by the plaintiff to the intestate. The bill had been amended by a charge that the title had been accepted, and that the defendants were not entitled to a reference of title; but the prayer of the bill remained as when it was first filed, and did not pray that it might be decreed that the defendant had accepted the title.

It was objected, therefore, that such a decree could not now be made; but

The MASTER OF THE ROLLS decreed that the plaintiff was entitled, under the prayer for general relief, to such remedy as the statement of

his case entitled him unto, and his honour decreed a specific performance.

The plaintiff's counsel, also wished to have it decreed that he had a lien on the estate for what remained due of the purchase-money; but his honour decreed that the Master should take an account of the personal estate of the purchaser, and ascertain the clear residue thereof applicable to the payment of the purchase-money; and if there was not sufficient, the plaintiff was to have a lien on the land sold, for so much as should not be paid out of the personal estate.

Reg. Lib. B. 1828. fol. 2319.

## Between William Phillips and Elizabeth his wife, plaintiffs; and George Parker, John Ullett, John Hurn Dove, Henrietta Dove, widow, Henrietta Dove, spinster, and Sarah Dove, defendants.

1 *Tamlyn*, 136.

Devise of lands, subject to 1000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon.

*Rolls*, July 21, 1829.

JOHN DOVE, by his will dated the 23d of June 1818, duly executed and attested, as by law is required for the devise of freehold estates after reciting that he had, for the advancement and preferment in life of his two sons Hargate Dove and William Dove, made ample provision and settlement for them, and that he therefore did not consider it requisite to make further provision for them, gave and devised unto his son John Hurn Dove, his heirs and assigns, *subject to the payments thereinafter mentioned, and to all such incumbrances as might happen to be thereon*, all that his freehold and copyhold estate, late Thomas Edwards', situate and being at Cawthorpe in the parish of Bourn, and other lands which the testator purchased of John Willoughby and others, and also all those freehold and copyhold lands lying in the South Fen of Bourn aforesaid, at a place called Coat Hills, subject nevertheless to the payment thereout, within twelve months next after his decease, of the sum of 1000*l.* of lawful English money, in equal shares and proportions, unto his three daughters, the plaintiff Elizabeth Phillips, Henrietta Dove, and Sarah Dove; and also to the payment of the sum of 37*l.* 10*s.* yearly, and every year, unto his the testator's wife Henrietta Dove, as an annuity for and during the term of her natural life, to be paid as thereinafter mentioned; *to hold* all and every the said messuages, lands, hereditaments, and premises, subject as aforesaid, unto his son John Hurn Dove, his heirs and assigns; but in case John Hurn Dove should die without leaving any lawful issue of his body, or leaving such issue, he, she, or they should happen to die under age without leaving the like lawful issue, then the testator gave and devised all and every the same estates so given and devised unto

his said son, unto his daughters the plaintiff, and the said Henrietta Dove and Sarah Dove, their heirs and assigns, as tenants in common, and not as joint tenants. And he gave and devised unto his two friends, George Parker, Esq. and John Ullett, Esq. certain freehold and copyhold houses and lands, and all other his freehold and copyhold estates not thereinbefore given and devised unto his son John Hurn Dove, to hold all and every part thereof as were freehold, unto the said George Parker and John Ullett, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell and absolutely dispose of the freehold part of such estate for the most money and best price or prices that could be had or gotten for the same, either together or in parcels, by public auction or otherwise as they might think proper; and as to the copyhold or customary part of such last described estates, he thereby authorized and empowered, or decreed and directed, the said George Parker and John Ullett, as soon as conveniently might be after his decease, to make sale and dispose of the same either together or in parcels, by public auction or private sale as aforesaid, to and for the best price or prices that could be had or gotten for the same; and all his horses, beast, sheep, cattle, corn, grain, hay, straw, implements of husbandry, debts, money, and receipts for money, and all other his personal estate and effects, of what nature or kind soever and wheresoever the same might be, and not otherwise thereby given and disposed of, he gave and bequeathed unto the said George Parker and John Ullett, upon trust, to sell and dispose of such part or parts thereof as should not consist of money or securities for money, as soon as conveniently might be after his decease; and out of the moneys arising from the sale thereof, after paying all his just debts, funeral expenses, legacies, and the expenses attending the provisions of that his will, first pay unto each of his daughters Henrietta Dove and Sarah Dove, the sum of 1500*l.* a piece; and from and after payment thereof, then upon further trust, to pay the residue or surplus thereof in equal shares and proportions unto his said daughters Henrietta Dove and Sarah Dove, and the plaintiff Elizabeth Phillips, their executors, administrators, or assigns; and he gave and bequeathed the same to them, together with their shares of and in the sum of 1000*l.*, thereinbefore directed to be paid to them by his said son John Hurn Dove, to be paid by his executors in trust within twelve months after his decease: and he gave and bequeathed unto his said wife all his household goods and furniture, plate, linen, woollen, kitchen, brewing, and dairy utensils, or such part thereof as she might think proper to make choice of, subject to the wear and tear thereof, for and during the term of her natural life, and from and immediately after her decease, he gave and bequeathed the same unto his said son J. H. Dove, his executors and administrators. The testator appointed the said trustees executors of his will.

The plaintiffs, by their bill of complaint, claimed to be entitled under the will to have one third of the sum of 1000*l.* raised and paid out of the estates specifically devised to John Hurn Dove, and that they were also entitled to one equal third part of the residue of the said testator's estate and effects. And the bill charged, that John Hurn Dove, notwithstanding he claimed an interest in the freehold and copyhold estates of the testator as heir at law and customary heir, also claimed to be

entitled to have the estates devised to him by the testator's will exonerated from all charges and incumbrances thereon, and especially from a sum of 3000*l.* and interest, charged thereon by way of mortgage.

The bill prayed that the will might be established, and the trusts thereof performed and carried into execution, by and under the direction and decree of the court; and that it might be declared that John Hurn Dove was not entitled to have the estates devised to him by the will, subject to the incumbrances thereon as aforesaid, exonerated and discharged from the mortgage of 3000*l.* and interest, or other the incumbrances on or affecting the same. And that in case the mortgage for 3000*l.*, or any other of the incumbrances on or affecting the estates devised to the said John Hurn Dove, should be paid or satisfied out of the personal estate of the testator, or any other part of his estate other than the estate subjected thereto as aforesaid, then that the same might be decreed to be made good out of the estate so devised to John Hurn Dove, and that the same might be raised by sale or mortgage of such last mentioned estates; and that the defendant John Hurn Dove might be decreed forthwith to pay to the plaintiffs, or to the plaintiff William Phillips, in right of his wife, and to the defendants Henrietta Dove, spinster, and Sarah Dove, in equal shares and proportions, the sum of 1000*l.* by the will bequeathed to them, and charged on and made payable out of the estates specifically devised by the will to John Hurn Dove, together with interest thereon from the end of twelve calendar months after the testator's decease; and that, if necessary, the 1000*l.* and interest might be raised by sale or mortgage of the last mentioned estate, or a competent part thereof.

John Hurn Dove, by his answer, insisted that he was entitled to have the hereditaments devised to him exonerated from the principal money (3000*l.*) due upon the said mortgage, and the interest due and to grow due thereon, and to have such principal money and interest paid out of the testator's assets.

It was on this point in the answer, that the case was discussed at the hearing.

Mr Pepys and Mr Younge for the plaintiffs. The estate devised to the defendant John Hurn Dove, is devised *cum onere*. This case differs from Searle and St. Eloy, and other cases which may be cited, inasmuch as the testator in the present case devised his estate, not merely subject to the incumbrances thereon, but subject to the incumbrances which might be thereon at the time of his decease, evidently intending to charge the devised estate for the purpose of increasing his personal estate. If the devisee of the estate be entitled to have it exonerated from the mortgage, the effect will be wholly to defeat the testator's intentions with respect to his personal estate, and deprive the parties interested in the personal estate of the provision intended for them. If the testator's intention can be regarded, no possible doubt can arise in this case.

Hancox *v.* Abbey, 11 Ves. 179, was cited for the plaintiffs.

Mr Norton in the same interest.

Mr Barber for the heir at law. The mortgage is one of the testator's

own creation, and a devise subject to a mortgage does not exonerate the personal estate. A devise of an estate subject to a mortgage is no more than would have been implied, and is not an exoneration of the personal estate from the payment of the mortgage. He cited the cases of Howell *v.* Price, 1 P. W. 293; Searle *v.* St. Eloy, 2 P. W. 386; Bartholomew *v.* May, 1 Atk. 487; Galton *v.* Hancock, 2 Atk. 427; Tweedale *v.* The Earl of Coventry, 1 B. C. C. 240; Barnewall *v.* Lord Cawdor, 3 Mad. 453.

Mr Pepys in reply. The testator devised the estate subject to 1,000*l.* and other incumbrances; that 1,000*l.* he gave by his will, and the estate must be held subject to that sum and to the mortgage. The estate being also in the same passage subject to the incumbrances which may be thereon, it is necessarily subjected as well to the mortgage as to the 1,000*l.*

The Master of the Rolls. The words are "subject to the payments thereinafter mentioned, and to all such incumbrances as might happen to be thereon." The personal estate is the primary fund for the payment of debts, and there must appear a clear intent on the part of the testator to exempt that fund; it has been repeatedly decided, that a devise subject to a mortgage does not exempt the personal estate. This devise is subject to the payments thereinafter mentioned, and the incumbrances that may be thereon. Now, the sums after mentioned are 1000*l.* and an annuity; it is hence attempted to be inferred, that the land must also bear the mortgage, but there is nothing in this case to distinguish it from the cases cited. Declare the personal estate liable in the first place.

By the decree it is declared, that the defendant John Hurn Dove is entitled to have the estate devised to him by the will of the testator exonerated and discharged from the mortgage of 3000*l.* and interest. The usual accounts to be taken of the personal estate. The personal estate to be applied in payment of debts in a due course of administration. Accounts to be taken of the freehold and copyholds. Estates devised in trust for sale. Further directions and costs reserved.

Reg. Lib. B. 1828, fol. 2309.

*Note.*—It is a general rule, that personal estate is first liable to the payment of mortgages in exoneration of the real estate mortgaged, (King *v.* King, 3 P. W. 359; Bartholomew *v.* May, 1 Atk. 487; Searle *v.* St. Eloy, 2 P. W. 386); and next, the real estate descended is liable, (Galton *v.* Hancock, 2 Atk. 425,) unless the debts are directed to be paid out of the lands devised, (Manning *v.* Spooner, 3 Ves. 115,) and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts (Barnewall *v.* Lord Cawdor, 3 Mad. 453.) If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the court will not disappoint the intention, (Ancaster *v.* Mayer, 1 Bro. C. C. 462; Oneal *v.* Mead, 1 P. W. 693, and Bootle *v.* Blundell, 1 Mer. 193; Watson *v.* Brickwood, 9 Ves. 447.) The personal estate of a son, on whom lands in mortgage descended, is not liable to the payment of the mortgage moneys (1 Ab. Eq. 270.) And the personal estate of a devisee of lands mortgaged by the devisor or his ancestors, is not liable to the payment of the mortgage money, (Shafto *v.* Shafto,

2 P. W. 664, note; Lawson *v.* Hudson, 1 Bro. C. C. 58.) The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgages, (Forrester *v.* Leigh, 2 P. W. 664, note; Tweddell *v.* Tweddell, 2 Bro. C. C. 101; Butler *v.* Butler, 5 Ves. 534,) unless the intention of the purchaser appears to be to make the debt his own, (Parsons *v.* Freeman Amb. R. 115; Woods *v.* Huntingford, 3 Ves. 132.) The distinction seems to depend upon communication with the mortgage, or some other act done by the party to make the debt his own. There is much information upon the subject in Butler *v.* Butler, and Woods *v.* Huntingford. A mortgage upon a man's estate not of his contracting, is not considered his debt, payable primarily out of his personal estate. On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate, as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust to sell and pay debts generally, does not exempt the personal estate (Tait *v.* Lord Northwich, 4 Ves. 816.) With respect to a devise upon trust for sale to pay debts generally, Lord Thurlow, in the case of Hale *v.* Cox (3 B. C. C. 322,) appears to have drawn a distinction on this point as against different characters,—legatee of personal estate, and next of kin,—expressing an opinion in favour of an exemption of legatees from the payment of a mortgage debt under the circumstances of that case; but, in the case of next of kin, charging the personal estate with the mortgage; and in subsequent cases (Gray *v.* Minnethorpe, 3 Ves. 103; Burton *v.* Knowlton, 3 Ves. 106; Brummel *v.* Prothero, 3 Ves. 110,) Sir Richard Pepper Arden, Master of the Rolls, recognized and acted upon the distinction, exempting the personal estate where specifically bequeathed, but subjecting it to mortgages where the personal estate went to the executor without any particular powers or appropriations; and in one of those cases the same learned judge said, he was not one of those judges who thought there was much difference between a charge for debts and a devise for payment of debts, unless there were demonstration that the personal estate was intended to be exempted.

In order to exempt the personal estate, the judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate; and circumstances, *dehors* the will ought not to be called in to assist the explanation (1 Mer. 216, 220): the judge will not look out of the will as to the state of the testator's affairs (3 Ves. 113.) In Bootle *v.* Blundell (1 Mer. 193,) the testator gave 3000*l.* to each of his daughters, and directed that his funeral expenses and legacies should be paid out of his moneys and the rents and fines then due to him. He gave the surplus to his son and daughters. The testator then devised all his manors to trustees for the term of 500 years, in trust, out of the rents and profits, to pay his debts, and the annuities and legacies thereinafter mentioned. Lord Eldon held, that the personal estate was exempted from the payment of debts.

## Harper and another, Assignees of Butler, plaintiffs; and Sarah Elizabeth Ravenhill and George Ravenhill, defendants.

1 *Tamlyn*, 144.

The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife

for the bankrupt: Held that the bankrupt, having survived his wife, the assignees became beneficially entitled.

Letters of administration, under which a plaintiff makes title, must be stamped *ad valorem*.

*Rolls*, July 11, 1829.

SARAH ROEBUCK, by her will, gave to her executors 6*l.* per annum bank annuities, and 1481*l.* 18*s.* 1*d.* three per cent. consolidated bank annuities upon trust for her daughter for her life as therein mentioned; and after her decease, to transfer the same unto and between her two grandchildren the defendant Sarah Elizabeth Ravenhill, and Ann afterwards the wife of James Arthur Butler, to be vested at the age of twenty-one years or day of marriage.

The testatrix's daughter and two grand daughters were the surviving executrixes, and they proved the will.

The bill stated the marriage of the granddaughter Ann with James Arthur Butler, his subsequent bankruptcy in 1818, and that the plaintiffs were the assignees under the commission. She died in 1820, in the lifetime of her mother, the daughter of the testatrix, leaving her husband her surviving, and letters of administration to her effects have been granted to the defendant George Ravenhill. The bankrupt died intestate in May 1821, and letters of administration to his effects were granted to the plaintiffs. The testatrix's daughter died in June 1823; and the plaintiffs claimed to be entitled to a moiety of the stock. Sarah Elizabeth Ravenhill was the surviving executrix of the will of the testatrix her grandmother. The stock remained in the name of the testatrix.

Mr Ching for the plaintiffs. All the interest of the bankrupt vested in the assignees, subject to the chance of the wife surviving him, but she died in her husband's lifetime, and upon her death the title of the assignees became perfect; the assignees have procured letters of administration to be granted to them; the administration has been taken without stamp, because the fund is in litigation, and the amount of the assignees' interest has not been ascertained.

Mr Rose and Mr Beames for the defendant, Sarah Elizabeth Ravenhill. The trustee is only anxious to pay the money to a competent authority, and the administration having been taken under 20*l.*, it did appear to her legal advisers that the administration did not give a sufficient authority.

The Master of the Rolls. I can only make a decree when the letters of administration shall have been corrected. Letters of administration are necessary to complete the title.

Mr Ching said he understood that the ecclesiastical court did not put a stamp when the property was in litigation, and he submitted that the court would then make the decree, putting the defendant upon terms to obtain the administration.

The Master of the Rolls. I think differently, for I must protect the revenue.

[Harper *v.* Ravenhill.]

Let the cause stand for a week, with liberty to the plaintiffs to take out proper letters of administration: the assignees now must do so; for having taken upon themselves the character of administrators, they can not now retire.

On a subsequent day the administration having been perfected, the cause was again brought on, when Mr Barber appeared for George Ravenhill, and contended that it was property acquired by the husband after the bankruptcy, and therefore did not pass under the assignment.

The MASTER OF THE ROLLS decided the contrary, holding it to be clear, that the beneficial interest passed to the assignees.

By the decree it is declared that George Ravenhill was a trustee for the plaintiffs for one moiety of the stock, and that Sarah Elizabeth Ravenhill should sell out the same; that the costs, charges, and expenses of all parties as between solicitor and client should be taxed. And Sarah Elizabeth Ravenhill, after deducting her own costs, and paying the costs of the plaintiffs and of George Ravenhill, should pay the remainder to the plaintiffs.

Reg. Lib. B. 1828. fo. 2124.

The order as to costs was an arrangement between the parties.

## Munnings *v.* Bury.

1 *Tamlyn*, 147.

A merchant, being abroad, empowers certain persons in this country to receive monies, adjust claims, and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposite the deeds with the Hope Insurance Company to secure 12,000*l.*, and covenant that he shall execute the mortgage; this 12,000*l.* was also secured by the bonds of sureties in sums corresponding to the shares of the partners.

The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the Hope Company, requesting the loan of 6,000*l.*, "to be secured on his Essex property, which you now hold, in addition to the 12,000*l.* already advanced;" and professing his readiness to execute the mortgage-deed:

Held, that this was a confirmation of the security.

Some of the parties having paid the amount of the sums secured by them:

Held, that they had a lien on the property.

One of those sureties being a partner:

Held, that the sum paid by him was subjected to the partnership accounts.

*Rolls*, July 15, 1829.

THE plaintiff was engaged in shipping and mercantile speculations with George Bridges, George Elmer, and Samuel Howlett, who carried on their business at Manningtree, in the county of Essex, under the firm of Bridges and Company; and with defendants, William Rothery, and Thomas Burleigh: the latter was the plaintiff's son-in-law. The firm of Bridges and Company were concerned in the ship Melantho, and in the speculations in which she was employed, in the proportion of

seven twenty-fourths; William Rothery in the like proportion of seven twenty-fourths; Thomas Burleigh in three twenty-fourths; and the plaintiff himself in the remaining seven twenty fourths. In February, 1815, this vessel was freighted by the owners for the Cape of Good Hope, and plaintiff went out as managing owner; several other ships and vessels followed him. In 1816 the plaintiff duly executed and sent to England a power of attorney to William Rothery and Thomas Burleigh, and Sally Munnings the plaintiff's wife, to recover all sums of money, goods, wares, and merchandises, effects, property, chattels, ships, and vessels, and to take all requisite proceedings at law and in equity for that purpose; to adjust, liquidate, and finally settle all accounts; and upon payment or receipt, in his name to sign, seal, and deliver all such receipts, releases, acquittances, and discharges, deeds or instruments as should be necessary; to compound debts and to indorse bills of exchange; to sell the ship Melantho and other vessels; to let and hire vessels to freight; to make insurances on ships, and generally to act for him. William Rothery was deputy chairman and a trustee of the Hope Insurance Company. The Hope Insurance Company having been applied to for a loan of 12,000*l.*, agreed to advance that sum upon a deposite of the title-deeds of the plaintiff; and thereupon certain articles of agreement were prepared, bearing date the 7th November 1817, and made between the plaintiff by the said T. Burleigh and Sally Munnings, therein described as his attorneys lawfully authorized for the purposes thereafter mentioned of the first part; the said Thomas Burleigh of the second part; the directors of the Hope Insurance Company of the third part; and William Rothery and four others, therein described as trustees of the said company, of the fourth part, reciting the power of attorney: It is witnessed, that in consideration of the sum of 12,000*l.* therein mentioned to be then advanced to and for the use and benefit of the plaintiff, by payment of the same into the hands of the said T. Burleigh and Sally Munnings as his attorneys as aforesaid, plaintiff, by the said T. Burleigh and S. Munnings, delivered unto and deposited with the company the deeds and writings as a pledge and security for the payment of the sum of 12,000*l.* with interest, on the 1st of June 1820. T. Burleigh thereby covenanted that plaintiff should within eighteen months execute a mortgage to secure the 12,000*l.*, interest, and costs.

A receipt for the 12,000*l.* from S. Munnings and T. Burleigh was indorsed.

As a collateral security to the company for the payment of the 12,000*l.* and interest, it was agreed that the said George Bridges and G. Elmer should procure two of their friends as sureties to execute a bond to the said trustees for securing 2333*l.* 6*s.* 8*d.*, being two thirds of seven twenty-fourths thereof with interest; and that S. Howlett should produce his brother as a security, to join with him in a bond for securing 1166*l.* 13*s.* 4*d.*, being the other or remaining one third of seven twenty-fourths thereof, with interest; and that the said William Rothery should procure two of his friends as sureties on his behalf to execute a bond for securing 3500*l.* being other seven twenty-fourths thereof, with interest; and that two friends of plaintiff and of the said T. Burleigh should execute a bond for securing 5000*l.*, being the remaining ten twenty-fourths thereof, with interest, on account of plaintiff and the said T. Burleigh.

Accordingly, four several bonds, bearing even date with the articles of agreement, and amounting to the sum of 12,000*l.*, were executed to the trustees named in the articles; viz. one of such bonds was the joint and several bond of the defendants John Elmer and John Lewis in the penalty of 4666*l.*, with the condition thereunder written for making void the same if plaintiff should within the space of eighteen calendar months execute the bond and mortgage in the articles mentioned, or failing that event, if J. Elmer and John Lewis should pay to the said company the sum of 2333*l.* 6*s.* 8*d.*, part of the said sum of 12,000*l.* with interest, and also with such costs as the company might incur in enforcing the performance of the said articles; and another of such bonds, was the joint and several bond of the defendants S. Howlett and R. Howlett, in the penalty of 2333*l.* with the like condition as aforesaid, save that the sum thereby secured was 1163*l.* 14*s.* 4*d.*, with interest and costs as aforesaid; and another of such bonds was the joint and several bond of the defendants J. Adamson and R. Jackson in the penalty of 7000*l.*, with a like condition as aforesaid, save that the sum thereby secured was 3500*l.*, and with interest and costs as aforesaid; and the other of such bonds was the joint and several bond of F. Stott, since deceased, to whose effects the defendant E. Stott, widow, hath taken out letters of administration, and the defendants Thomas Stott and John Burleigh in the penalty of 10,000*l.* with a like condition as aforesaid, save that the sum thereby secured was 5000*l.*, with interest and costs aforesaid.

The 12,000*l.* was received by Mr. Ireland, a solicitor appointed by Mrs Munnings and T. Burleigh, and applied by him, through Rothery and T. Burleigh, in payment of the debts of the partnership.

William Rothery executed and gave to Sally Munnings and Thomas Burleigh his bond, bearing date the 4th February 1818, whereby he bound himself in the penal sum of 2000*l.*, with a condition thereunder written, reciting the power of attorney and the articles of agreement, and that the sum of 12,000*l.* had been accordingly advanced by the said office, and that it had been agreed that the interest of the said sum of 12,000*l.* when the same should from time to time become due, should be paid and discharged out of the remittances which should or might be made by the plaintiff; but in the event of such remittances not arriving in due time, it had been agreed that the interest should be advanced and paid in the proportions following; (that is to say,) the interest for the sum of 5000*l.*, part of the said sum of 12,000*l.* by the said T. Burleigh and Sally Munnings, on the part and behalf of the plaintiff and of the said Thomas Burleigh; the interest of the sum of 3500*l.*, further part thereof, by the said William Rothery; and the interest of the remaining 3500*l.*, by George Bridges, George Elmer, and Samuel Howlett, constituting the late firm of Messrs Bridges and Elmer: but that when remittances should arrive sufficient to enable the aforesaid interest to be paid, that the several sums of money which should have been advanced and paid in the proportions aforesaid should be refunded and repaid to the said parties respectively, so far as the said remittances would extend for that purpose; and that, for the purpose of effectuating such arrangement so far as related to William Rothery, it had been agreed that he should enter into that bond with the following condition:—"That if the said William Rothery,

his executors or administrators, did and should from time to time, so long as the said sum of 12,000*l.*, or any part thereof, should remain due and owing to the said Hope Assurance Company, upon the security aforesaid, apply such remittances as should or might thereafter come to his hands from the plaintiff, or on his account, in paying and discharging the interest of the said sum of 12,000*l.*, or so much thereof as such remittances would extend to pay at the times when the same should become due and payable; and in the event of not receiving remittances in sufficient time for such purpose, or in case the same should be insufficient to pay the whole of the interest due, then if he the said William Rothery, his heirs, executors, or administrators, should, out of his own proper moneys, well and truly advance and pay, or cause to be paid and advanced, unto the said T. Burleigh and Sally Munnings, their executors or administrators, within twenty-one days next after they or either of them should have paid such interest to the Hope Assurance Company, the interest of 3500*l.*, part of the said sum of 12,000*l.*, or such part of the sum actually paid by the said T. Burleigh and Sally Munnings, their executors or administrators, as should be in the same proportion to the sum actually paid as the said sum of 3500*l.* bears to the said sum of 12,000*l.*; and that in case remittances subsequently arrived and came to his hands, if he the said William Rothery, his executors or administrators should forthwith thereout repay to the said T. Burleigh and Sally Munnings, their executors or administrators, *pari passu* with himself and the said Messrs Bridges and Elmer, such sum or sums of money as he, she, or they should or might have theretofore advanced and paid on account of the said interest, or so far as such subsequent remittances should extend, *then* the said bond or obligation to be void, or else to remain in full force and virtue." There was also a similar bond from George Bridges, George Elmer, and Samuel Howlett to the said Sally Munnings and Thomas Burleigh, bearing date the same 4th day of February 1821, in a like penalty of 2000*l.* and with a like condition; but there was no evidence to show that this bond was executed by any person but George Elmer.

The plaintiff by his bill charged that the sum of 12,000*l.* ought to be considered as having been received solely upon the security of the obligors in the said four several bonds to the trustees, and that the company ought to be compelled to deliver up to the plaintiff the several title-deeds, evidences, and writings, free from all claim and demand whatsoever of the said company; and the plaintiff charged, that he had not confirmed the security, and that all his letters to the Hope Company were conditional propositions. And the bill prayed, that the defendants might make a full, fair, and perfect discovery of all and singular the matters aforesaid. And that the defendants, the trustees of the company, might be compelled to deliver up to plaintiff all the title-deeds, evidences, and writings of or relating to his said estates, or any of them, freed and discharged of and from all claim and demand whatsoever in respect of the premises. And that the articles of agreement bearing date the 7th day of November 1817 might be delivered up to be cancelled. And in case it should be held by the court that the plaintiff was bound to pay the 12,000*l.*, or any part thereof, that William Rothery and plaintiff's other partners might be compelled to repay and make good to plaintiff the said sum of 12,000*l.* and interest, or

what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of the 12,000*l.* as such partner as aforesaid. And that the Hope Insurance Company might be directed to hold the shares of William Rothery and Thomas Burleigh of and in the capital stock thereof, and the dividends which had accrued or should accrue due thereon as trustee for the plaintiff, for the purpose of reimbursing him the said sum of 12,000*l.* and interest, or what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of and in the same as such partner as aforesaid.

A supplemental bill stated an action brought by the Hope Insurance Company against the plaintiff, for recovering what remained due to them, in which a verdict was found for 8008*l.*, and that judgment had been entered up for the same and 280*l.* costs; and set forth a mortgage by plaintiff to the Hope Insurance Company for 8478*l.*, the amount of the judgment obtained against him for damages and costs, and including 190*l.* for interest; and charged that the persons who entered into the four several bonds had no lien upon the deeds; and praying that he might be allowed to redeem on payment of the principal money and interest on such mortgage.

Samuel Howlett and Robert Howlett being called upon by the Hope Insurance Company for the sum of 1166*l.* 13*s.* 4*d.* mentioned in the condition of the bond, and Samuel Howlett being unable to pay the same, Robert Howlett paid the principal, and Samuel Howlett a small sum for interest; and they claimed a lien on the securities in the hands of the Hope Insurance Company, as a security for the repayment thereof by the plaintiff. John Adamson and Richard Jackson had made an investment to secure the sums in their bonds.

John Elmer invested 600*l.* of the moneys secured by the bond of himself and John Lewis.

John Lewis was sued on the bond, and judgment obtained against him for the remainder.

The plaintiff returned to England in the month of October 1821, and on the 8th of November 1821, wrote the directors the following letter:—"Being desirous of raising a sum of money to discharge some engagements entered into by me and others, which remain to be paid, I propose to borrow a sum of 6000*l.* to be secured on my Essex property which you now hold, in addition to the sum of 12,000*l.* already advanced by your honourable company, and secured thereon; which security I trust you will consider to be satisfactory, you having already received in aid of the said security between 5000*l.* and 6000*l.*: having been abroad during the last six years in the East Indies, the mortgage deed for securing the above sum of 12,000*l*, which I understand was sent to me to be signed, never reached me. That deed I am ready to execute, and to do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced. I am, Gentlemen, your obliged humble servant, G. G. H. Munnings."

On the 20th November 1821, the following letter was written by the plaintiff to the Hope Company:—

"Gentlemen,—When I had the honour to attend your board on

[Munnings *v.* Bury.]

Wednesday last, a question was proposed to me by one of the gentlemen of the board, if I should be willing to pay the balance of principal and interest due to the Hope Company, they retaining the money already received by them under the collateral bonds, on the delivery to me of the title-deeds of my estates in Essex, now in your possession for securing 12,000*l.* and interest; to which I replied, that if I could accomplish it I would readily pay the balance, and that I would lose no time in considering it. I have since weighed the matter fully in my mind; and I will engage to pay such balance on the company delivering to me my title-deeds now in their possession, and executing a sufficient release. Should this be declined on the part of the Hope, I will then propose to perfect the mortgage-deed already prepared for securing to the Hope Company 12,000*l.* and interest, in any way that may be deemed necessary in order to make them perfectly secure, they withholding proceedings against the persons who have executed collateral bonds on my part for securing 5000*l.*, part of the said 12,000*l.*, for such time as may be agreed upon; and also to permit Messrs Adamson and Jackson to withdraw the 3500*l.* paid by them conditionally in aid of the said mortgage. The above proposals are made in order to save unnecessary expense, and to enable me to exert myself to discharge the mortgage altogether, which it is my most anxious wish to do.

"I am, gentlemen,

"Your much obliged, humble servant,

"G. G. H. Munnings."

The directors having refused to make a further advance, on the 27th November 1821, the plaintiff wrote to the directors, that being disappointed in his application to the Hope for the sum of 6000*l.*, or to deliver to him the title-deeds on his paying 5000*l.*, which he stated was his share of the 12,000*l.*, he must decline executing the mortgage.

The Hope Company by their answer contended, that they had a lien on the deeds for 12,000*l.* and interest.

The defendant Rothery said, that although the partners were to procure collateral securities according to their shares, yet it was to be merely collateral to the deposite of the deeds, and that the estates were to be charged with the 12,000*l.* He stated that the Hope Company had retained his dividends on the shares he had therein as a security for the 12,000*l.*, in case it should be held that the plaintiff was not bound to pay it.

The other partners admitted in their answers that they were to procure collateral securities, but they all, except G. Bridges, denied it was on their own behalf. G. Bridges admitted that he and George Elmer were to find sureties on their own behalf.

Rothery contended, that the plaintiff was still indebted to him in a considerable sum of money.

Mr Rose. The plaintiff is a gentleman of considerable landed property, and a merchant, and the defendants are the Hope Insurance Company and others. The object is to obtain as against the insurance company the deeds, not disputing to pay them their principal and interest, but denying the right of the sureties to any claim upon the deeds. The plaintiff was entitled to seven twenty-fourths of this joint adventure. Up to 1814 this speculation was fortunate. In 1814 the

plaintiff went to the Cape on an adventure to the joint account. The bonds were entered into by or on behalf of the partners for their own respective proportions: Rothery had no right to raise money upon the plaintiff's deeds. The 12,000*l.* was not to be thrown upon the plaintiff, but only a fractional part of it equal to his interest. The ship Melantho was sent home to this country to be sold. (Mr Rose then read several letters from Rothery to the plaintiff, dated Doctors' Commons, one on 16th November 1815, suggesting a new mode of remitting; another letter in January 1816, that a dissolution of partnership had taken place between Bridges and Elmer, and expressing his astonishment at it. Another letter in February 1816, that Bridges and Elmer could not provide their proportion of the acceptances coming due, and expressing that it was fortunate that he did not meet with a ready sale at the Cape, as he would then have remitted the produce to Bridges and Elmer, expressing his opinion that they were not rich. Another letter, 20th March 1816, repeating the good fortune of no ready sale; and another letter, 7th December 1816.) These letters present perfect satisfaction with the plaintiff, and that his property was not to be resorted to.

The power of attorney was dated in May 1816, and does not notice the relation of the plaintiff with the partners, and the plaintiff thereby appoints his wife, Burleigh and Rothery his attorneys, to defend actions, to sell the ship Melantho, to effect insurances, &c. It is given by the plaintiff in his individual character; it does not give authority even to borrow money, but only to do the special acts mentioned. The Hope Insurance Company must put their case upon this power of attorney, and that power can not support it. It is true, there are general words to act generally. In the case of Atwood and Munnings, 7 B. & C. 278, in the King's Bench, the general power was held only to enable the attorneys to carry the special powers into execution; and that a bill drawn by the attorneys for partnership purposes was not within the power. If Rothery had not combined the character of chairman of the Hope Insurance Company and plaintiff's agent, no money would have been advanced by that company: if, therefore, he, under the power of attorney borrowed money for partnership purposes, he could not legally do it. Did Rothery make use of the plaintiff's deeds for the purposes of the plaintiff, or for his own purposes? The transaction could not bind the plaintiff, nor affect his title-deeds. The inference to be drawn from the deeds executed by Mrs Munnings and T. Burleigh is, that the company's legal advisers well knew it; or why, if the attorneys had sufficient authority, was a covenant introduced, that the plaintiff should execute a mortgage in eighteen months? Rothery is a general trustee for the company, and as such the covenant was made with him; and as such, and not as one of the attorneys, he was a party. There can be no case as against the plaintiff in such a transaction. It is a distinct case from Rothery borrowing money as a partner. No letter reached the plaintiff after the letter of December 1816. He did not arrive in this country until December 1821, when he was ignorant of what had been done, but he soon found an immediate necessity for raising 6000*l.*, and he wrote a letter to the insurance office bearing date the 8th November 1821 (ante, p. 154.,) and another letter on the 20th November 1821 (ante, p. 155.;) also another letter of 27th November 1821, declining to execute the mortgage. Now, upon the whole of

these letters from the plaintiff to the Hope Insurance Company, it is plain that he was acting under the impression that his property had been properly dealt with. His attention had not been deliberately directed to the facts, and, therefore, the letters could not be held to be a confirmation. It was to be considered only as a proposal to execute the mortgage, if 6000*l.* more were advanced. It was not accepted by the company, and effected nothing.

The Hope Company brought an action of *assumpsit* against him; by some slip he had not been able to plead in abatement, and he was put under terms not to take advantage of his partners not being parties, and a verdict passed against him. He then executed a mortgage to the Hope Insurance Company, mentioned in the supplemental bill.

Mr Lynch. The condition of each bond was, that if the plaintiff failed to execute the mortgage the obligors were to pay these sums. The power of attorney is not recited in the bonds; but the bonds notice the articles of agreement. The sureties, by their answer, state that the bonds were entered into at the solicitation of the respective partners for whom they were sureties.

These sureties were for 7000*l.*, and the 5000*l.* makes the 12,000*l.*

I mean to say, first, that they were not sureties for the plaintiff; secondly, that there was no valid deposite; and thirdly, that there was no confirmation.

A person entering into a bond does not become a surety without the request of the principal. These sureties could not have been for the plaintiff, he being abroad.

The assurance on Mrs Munnings's part with the deeds, was, that each of the parties should get his own securities in respect of his share. There is no evidence that they were the plaintiff's sureties. The case of Atwood and Munnings in the King's Bench has decided that a general power did not give the authority. Again the deposite can not be extended beyond the Hope Company; that has been decided in *Ex parte Whitbread*, 1 Rose, 299: it surely will not be contended that the loose language of the letters gives such an authority. Next as to confirmation, if the parties had no power to deposite the deeds the transaction is good for nothing. Rothery obtained this money, not for the use of the plaintiff, but for partnership purposes; a partner has not a right so to deal with his co-partner's property. The letters of the plaintiff are mere conditional proposals, which not having been accepted, can not be read against him according to the decision of judges both at law and in equity. These letters do not refer to the sureties; and, at all events, they can not be carried further than as securing the company. And there is no evidence to show that the plaintiff was aware of the circumstances when he wrote the letters.

The Master of the Rolls. On the 7th of November 1817, Mrs Munnings and Mr Burleigh, her son-in-law, on the company advancing 12,000*l.*, covenant that the company shall retain the deeds as security, and Burleigh covenants that the plaintiff shall execute a bond or mortgage for securing that sum. It is impossible to contend that they had authority to enter into that engagement; but did Mr Munnings confirm it? Mr Munnings at that period was abroad, and he continued abroad until October 1821, when he returned. On the 8th of

November he writes a letter to the Hope Insurance Company. I can not conceive any language more clear and express than his admission of the engagement entered into by his wife and son-in-law. His letter is in these words :—"Being desirous to raise a sum of money to discharge some engagements entered into by myself and others, which remain to be paid, I propose to borrow a sum of 6000*l.*, to be secured on my Essex property, which you now *hold*." He then proceeds, "in addition to the sum of 12,000*l.* already advanced by your honourable company and secured thereon, which security I trust you will consider to be satisfactory." Now it is asserted at the bar that this is not admission, but merely proposal, "which you will consider to be satisfactory." Does not this show that he had no idea of disturbing the security. He then adds, "you have already received in aid of the said security between 5000*l.* and 6000*l.* Having been abroad during the last six years in the East Indies, the mortgage deed for securing the above sum of 12,000*l.*, which I understand was sent to me, never reached me. That deed I am ready to execute, and do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced." This, too, it is contended, is a conditional proposal. A greater perversion of the effect of language could scarcely have been made. Now, without referring at all to the other letters, this is a clear acknowledgment of the title of the Hope Insurance Company.

But it is said that he was in ignorance of the facts : is it possible to believe this gentleman had not been informed by his wife and son-in-law of all they done on his part? It must be intended upon every principle of evidence that when he wrote this letter he was in full possession of all the facts.

The next question is, whether the sureties, and who in particular of them, have a right to stand in the place of the mortgagees. One of these sureties was a partner, and he must submit to a partnership account.

The other persons who entered into these securities were not partners, and it is said they have no claim on the estate, as their security was given on account of others of the partners, at whose request they entered into the engagements. If it had been stipulated when they became sureties that they should not claim against the plaintiff's estate, it would have been a different matter. On what principle, then, is it that they are not entitled to the full benefit of the security arising from Mr Munnings's estate? The question is, have the sureties a lien on the estate? If a surety pay part of a sum for which an engagement has been entered into by the principal, he may claim against the estate that formed the principal security.

It is impossible without stipulation to exclude the sureties from being entitled to the security of the estate pledged. I am of opinion that they have a lien upon the estate pledged for the sums paid by them.

Refer the partnership accounts to the same Master before whom the partnership accounts were taken in another cause.

I must declare that the several sureties not being partners have a lien upon this estate for the amounts they have paid, with interest and costs.

[Munnings *v.* Bury.]

The decree has not yet been passed and entered, but the following is the substance of the minutes as they at present (March 1830) stand:—

Decree, that, subject to the mortgage to the Hope Insurance Company, The defendants, J. Adamson, Richard Jackson, John Lewis, John Elmer, Robert Howlett, and John Burleigh, and Elizabeth Stott, as the representative of Thomas Stott deceased, sureties for the plaintiff to the Hope Assurance, and not being partners with the plaintiff, are entitled to a lien on the estate for the principal money paid by them in respect of the sum of 12,000*l.*, together with interest at five per cent., and their costs and charges. Refer it to the Master to take an account of what is due to the Hope Insurance Company for principal and interest on the mortgage in the pleadings named, and to tax their costs.

Also to take an account of what is due to the sureties for principal and interest, charges, and expenses, and to tax their costs.

Decree, that upon plaintiff paying what is due to the insurance company and sureties within six months after the Master shall have made his report, then the trustees of the Hope Insurance Company reconvey the mortgaged premises to the plaintiff, and that the sureties join therein. In default of the plaintiff redeeming the insurance company, the sureties are to be at liberty to redeem the company, and then it is referred to the Master to tax subsequent interest and costs, and appoint a new time and place for payment; and upon the sureties paying to the trustees of the insurance company their principal, interest, and costs, within three months after the Master shall have made his report, at such time and place as the Master shall appoint, the trustees are to reconvey to the sureties; and in default of payment both by the plaintiff and the sureties, the bill to be dismissed as against the trustees of the company and the sureties with costs. The Master to take an account of all partnership dealings and transactions between the plaintiffs, and the defendants William Rothery, George Bridges, George Elmer, Samuel Howlett, and Thomas Burleigh. The Master to be at liberty to state special circumstances.

Further directions and costs reserved.

## Barton and others *v.* Croxall and others.

1 *Tamlyn*, 164.

A testator devised his moiety of an estate, and then made partition with his co-tenant; on this the estate was conveyed to a trustee as to one part of the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance: Held, that this is not a revocation of the will.

Costs refused to the heir at law, he having conveyed his interest to two of his sisters.

*Westminster Hall*, July 3, 1829.

JOHN BARTON, by his will, bearing date the 8th of September 1775, gave unto Edward Croxall, Esquire, the sum of 500*l.*, to be raised and paid out of moneys to arise from the sale after-mentioned of his copyhold and real estates, upon the trusts therein mentioned; and

he gave and devised unto his wife and Edward Croxall, their heirs and assigns, with other hereditaments, his undivided moiety or half part of and in a messuage, and certain lands, upon trust, that his wife and Edward Croxall or the survivor of them, or the heirs of such survivor, should, when and as soon as they should think fit, sell and dispose of the same: and the money arising by and from such sale, after payment of the 500*l.*, he willed and desired to be placed at interest, until the same should be paid to his children, at the time and in manner thereinafter mentioned; which interest, and the rents and profits, in the meantime, were to be applied to the maintenance of the children, with the usual directions for the trustees to convey to the purchaser.

There were at this time seven children, but by a codicil the testator directed that John Barton, his eldest son, should have no share of the moneys to arise by the sale; and that the part intended for him should be divided amongst his other children, except his daughter Jane; and the testator also directed that a sum of 100*l.* which he had given to her, should be considered as part of her share under the will.

The testator, after making his will, agreed with Carter Barton, the person entitled to the other undivided moiety or half part of the messuage and lands for the division thereof; and accordingly the testator and Carter Barton entered into mutual bonds, bearing date respectively the 16th April 1788, whereby they severally became bound to abide by the award of Edward Palmer and Thomas Hanson, who were to make a fair partition of the premises; and to settle all other matters between the parties, relating to the same premises. The arbitrators accordingly proceeded in making a partition of the estate between the testator and Carter Barton; and by indentures of lease and release, bearing date respectively the 15th and 16th days of June 1791; the release between Carter Barton, of the first part; the testator, John Barton, of the second part; Joseph Scott, a mortgagee for years of Carter Barton's undivided share, of the third part; John Dale, of the fourth part; and Charles Palmer, of the fifth part. After reciting amongst other things the award of the arbitrators, Carter Barton and the testator conveyed unto John Dale the messuage, buildings, and premises, to the several uses following (that is to say): as to the south side of the said messuage, buildings, lands, and premises therein particularly described, to the use of Carter Barton, his heirs and assigns for ever; and as to the north side thereof, therein also particularly described, to the use of the testator, his heirs and assigns for ever, free from all incumbrances except a mortgage term of 1000 years created of Carter Barton's moiety of the said premises, and then vested in the said Joseph Scott; and the said Joseph Scott, in consideration of the principal and interest to him paid by Carter Barton, assigned the undivided moiety of the premises so in mortgage to him, to Charles Palmer, his executors, administrators, and assigns, for the residue of the said term of 1000 years therein then to come and unexpired, in trust as concerning the north side or part of the entirety of the premises for the testator John Barton, his heirs and assigns, and to attend and wait upon the freehold and inheritance of the said north side or moiety of the premises; and as to and concerning the south side thereof, in trust for Carter Barton, his heirs and assigns, and to attend and wait on the freehold or inheritance of the south side or moiety of the premises.

[Barton *v.* Croxall.]

The testator died on the 21st March 1792, some time after the execution of the said deeds of partition, and without having altered, expressly revoked, or republished his will, and leaving Jane Barton his widow, John Barton his eldest son and heir at law, and six other children; these six younger children then became entitled to the moneys which should be produced by the sale.

The bill, after setting forth the preceding facts, then states, that notwithstanding the great length of time which had elapsed since the death of the testator Edward Croxall, the surviving trustee under the will of John Barton, had not proceeded to a sale of the premises devised to him for that purpose by the will of the testator. And the bill charged, that he refused to do so without the direction of the court. And the bill prayed, that Edward Croxall might be decreed to proceed to a sale, that all necessary parties might join therein, and that the moneys to arise therefrom might be divided amongst the plaintiffs and other persons entitled thereto.

Edward Croxall having died, the bill was revived against his son *of the same name*, who in his answer admitted that his father never did proceed to a sale, because, that for many years after the death of the testator, the parties interested in such sale did not require such sale to be made, or did not agree about the sale thereof; and that some of the parties were unwilling it should take place, and submitted to act as the court should direct. This defendant then also died, and the bill was revived against his devisees, Wm. Tongue and Thomas Holbecke.

The heir at law, by his answer, submitted it was a question of law, whether the said alleged deeds of partition of the 15th and 16th of June 1791, did or not, in any and what manner, operate as a revocation of the testator, John Barton's, will, in the whole or in any, and what part thereof, and how. Also whether he was or was not entitled to the moiety of the lands, hereditaments, and premises as the heir at law of the testator John Barton, or to such portion or part of the entirety as the testator acquired under the alleged deeds of the 15th and 16th June 1791, if such were made, or any other deeds, and if such deeds of the 15th and 16th June 1791, or any other deeds operated as a revocation of the testator's will and codicil, which the defendant submitted to the judgment of the court.

Mr Pepys and Mr Whitmarsh for the plaintiffs.
Mr Roupell, jun., for one of the children.

Mr Beames for the heir at law. The partition was a revocation of the will, because the testator, or more properly his trustee, took under the conveyance an estate different from that he previously possessed. The two owners conveyed to a trustee, and a term was assigned to attend the inheritance. It is not meant to contend that a simple partition revokes a devise, Luther *v.* Kidby, 8 Vin. tit. Devise. 3 P. W. 170. 2 Ves. jun. 600. Swift *v.* Roberts, Burr. 1490, but to avoid a revocation he must take back the same estate. In the case of Tickner *v.* Tickner, cited in Parsons *v.* Freeman, 3 Atk. 742. Ambler, 116, the father died seised in fee of an estate in gavelkind intestate, and left two sons, who entered on his death and became seised in gavelkind. One of them made his will, and thereby devised his undivided moiety to his wife and

her heirs. Subsequently by a deed of partition between the brothers, and by a fine, all this gavelkind estate was allotted entirely to him who had so made his will to such uses as he should appoint by deed or writing. And in default of such appointment to him in fee, this was held by Lord Chief Justice Lee to be a revocation of the will.

There was also the case of Goodtitle and Otway, 1 B. & P. 576; 2 H. Bl. 516; 7 T. R. 399; Sparrow *v.* Hardcastle, 3 Atk. 803; 4 Burrow, 1690; 1 Roll. Abr. 615; in which the question was, whether a devise was rendered ineffectual by a subsequent lease and release to trustees upon certain trusts, with remainder to the testator in fee. Mr Justice Rooke said, if a testator having executed his will, conveys away his whole fee simple, though it be to his own use, yet, according to the rules of law, that conveyance renders the will ineffectual, for he has altered his legal seisin. He added, partition is an exception, for parceners, and tenants in common being seised only of their respective portions in an undivided whole, would, by a writ of partition, retain their seisin in the portions allotted them, and they may divide by deed and fine, Risley *v.* Baltinglass, Sir T. Raym. Rep. 240; but he adds, the courts of law are rigid in this, and cites the example of Tickner *v.* Tickner as a revocation.

Mr Justice Buller considered the point of revocation so fully established by ancient and modern authorities, that to doubt about it would be to shake the rules of property: referring to Tickner *v.* Tickner, Amb. 117, he said the fee and the old use vested in the testator, and yet because the partition was made by means of a conveyance to a trustee, it was holden to be a revocation. He found it difficult to reconcile the case of Tickner *v.* Tickner with Luther and Kidby, if in partition the estate be conveyed to a trustee, though for an instant only, and though the old use remain, he thought that cases established it to be a revocation.

In a subsequent case, Bridges *v.* Duke of Chandos, 2 Ves. 429. Knollys *v.* Alcock, 7 Ves. 564, Lord Eldon said, "that the devisor must continue to have the land to his death, when the devise is to take effect; if a partition is effected either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation; the slightest addition to that purpose will make it, not as a partition, but on account of that slight addition, a revocation, and if the parties will even introduce a power of appointment prior to the limitation of the uses, that very slight circumstance is sufficient." In another case, Attorney-General *v.* Vigor and others, 8 Ves. 281; Ward *v.* Moore, 4 Madd. 368; Rawlins *v.* Burgis, 2 V. & B. 382; Lord Eldon said, the case of partition is always considered a sort of special case, each party can compel the other to make partition. There is one other case before Lord Eldon, that of Maundrell *v.* Maundrell, 10 Ves. 249, where his lordship said that the distinction between Tickner *v.* Tickner, and Luther *v.* Kidby was obvious: in the one, the object was a mere partition; the devisor, having an undivided moiety of an estate, took a divided moiety, and it was held no revocation, there being no purpose beyond partition; but where a partition is made, and in the mode of doing it the devisor conveys to such uses as he shall appoint, and in default of appointment to himself in fee, that is a revocation. Why? Because he had limited the power. This principle was acted upon in

Rawlins *v.* Burgess, 2 Ves. & Bea. 312. A person who had contracted for the purchase of an estate made his will, and afterwards took a conveyance to the common uses to prevent dower: the Vice-Chancellor considered the question to be, whether the estate remained the same without modification. The contract pointed only at an estate in fee. The conclusion must be, that there was some object beyond the mere completion of the contract, by taking the legal estate; and consistently with all the authorities, the effect is a revocation. The same point was decided in Ward *v.* Moore, 4 Mad. 372. The subsequent conveyance made an alteration in the quality of the estate, and was, therefore, a revocation. From all these authorities it follows that the partition and the mode of effecting it, were in the particular case now before the court a revocation of the will.

Mr Bickersteth and Mr Lynch, for several of the children, opposed the sale, contending they had a right to elect to take the fee.

The Master of the Rolls. The testator has directed a sale. It is true they might have elected to take real estate, but what pretence is there to say they have elected? There is nothing to show that the parties intended to give up the advantage of the sale; therefore the only point I wish to call attention to, is that of the partition.

Mr Pepys contended, that that which is necessary to the partition is not a revocation, but what is inconsistent with it, is; and that in this case the assignment of the term was not inconsistent with partition, and that nothing had been done that would have the effect of revoking the will.

Mr Bickersteth then commented upon the case of Tickner *v.* Tickner, cited by Mr Beames, and contended that not any case had been cited where the party took the same interest, in which it had been held that a partition was a revocation.

Cur. adv. vult.

*Feb.* 8, 1830.—The Master of the Rolls.—It is admitted that a mere partition, without more, does not revoke a will. Here the nature of the interest was not changed, nor was there a new power of disposition acquired, and a mere assignment of a mortgage term to attend the inheritance does not revoke the will.

Decree a sale, and that all proper parties join therein, and in the conveyance, including the heir at law, and that the purchase money be distributed according to the rights of the parties as prayed.

Costs were refused to the heir at law, and to those who claimed under him. It appeared that the heir at law had conveyed to two of his sisters.

The representative of Edward Croxall the trustee to have his costs as between attorney and client; and all other parties who do not claim adverse to the will, to have their costs.

## France *v.* Woods.

1 *Tamlyn*, 172.

Trustees not affected by notice to their agent, which he did not receive in that character.
Trustees, having contracted to purchase land, sell out stock, and deposite the produce at a banker's, when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail.

*Rolls*, July 22, 1829.

THE bill, in this cause, was filed for the purpose of administering the assets of John France, by the person entitled for life to the income of the real and personal estate. The defendants were his executors, Thomas Woods and Wm. Berry, and several persons interested under his will. The bill also sought to make the executors personally liable for certain sums, parts of the assets, which had been lost by the failure of Messrs Warwick and Company, bankers.

By the decree made by the Vice-Chancellor on the 26th February 1827, it was referred to the Master to take the usual accounts of the testator's personal estate, debts, funeral expenses, and legacies; "and in taking the account of the testator's personal estate, it was ordered that the Master should ascertain and state to the court what balances or sums of money, part of the testator's personal estate, or the interest or dividends arising therefrom, were in the bank of Messrs Warwick and Co. at the time of their becoming bankrupts, and under what circumstances such balances or sums of money were paid by the defendants into the said bank, and whether the same ought to have been paid into or allowed by the said defendants to have remained in such bank, particularly in reference to the respective times when the said moneys were so paid into the said bank."

By the Master's report, dated the 12th October 1828, he stated the testator's will, by which he directed payment of several sums of money; and that his executors should not be answerable for the loss of the trust moneys, "in depositing the same in any banker's hands or elsewhere for safe custody." And that the testator, for a very long time before his death, kept his banking account with Messrs Warwick and Co., and had always a considerable balance of cash in their hands, amounting at the time of his death to 5696*l.* 10*s.* 2*d.*, and that they allowed him 4 per cent. interest on his balance; and that Thomas Crook, who was a principal clerk in the banking-house of Messrs Warwick and Co. for some years previous to, and at the death of the testator, was, as such principal clerk, frequently consulted and employed by him as his confidential agent in the management of his pecuniary concerns; and that after the death of the testator, the defendants, Thos. Woods and Wm. Berry, with the concurrence and approbation of the plaintiff, applied to and requested the said Thos. Crook to assist them in and about the testator's property, and the management of the executorship and of the trusts; and that the defendants resided a considerable distance from each other, and from the neighbourhood of the testator's real estate, and were wholly incompetent and unable to manage the affairs of the

trust without assistance; and that they accordingly, with the approbation of the plaintiff, employed Thos. Crook to assist them in various matters respecting the executorship and trust; and that the defendants, in the presence of the plaintiff, agreed to employ Messrs Warwick and Co. as their bankers in respect of the trust moneys belonging to the testator's estate; and that Messrs Warwick and Co. were induced, in consideration of the large balance which the testator had left in their hands, to allow upon all the trust moneys deposited with them the same rate of interest which they had allowed to the testator during his life, although interest at 3 per cent. was usually allowed by them upon temporary deposites; and that the defendants employed Messrs Warwick and Co. as their bankers in respect of the trust moneys, until they stopped payment and became bankrupts; and that there were then in their bank the balances mentioned in the report, part of the testator's personal estate, or interest or dividends arisen therefrom.

And he found that the defendants, in execution of their trust, had entered into a contract for the purchase of real estate; and when they had every reason to believe that the purchase would be completed without delay, in order to provide for the payment of the balance of the purchase-money, and also to raise certain other sums of money which were then wanted for the trust estate, and for which the defendants had not sufficient funds in their bankers' hands, they, in the month of August 1821, sold out 3000*l.* navy 5 per cents., and caused the produce to be placed in the bank of Warwick and Co., and the defendants on that occasion stated to Thos. Crook, that they firmly believed that the money would be called for in a very short period of time. And he stated the circumstances which had delayed the conclusion of the purchase; and that, consequently, the defendants were prevented making the payment of the balance of the purchase-money, amounting to 3200*l.*, out of the funds which were in the hands of the bank of Messrs. Warwick and Co. previous to their bankruptcy. And the Master allowed the executors these balances.

The plaintiff excepted to the Master's report. The first exception being, that the Master ought to have stated that he found by the depositions that Thomas Crook was, from the 1st January 1810 to the time of the said Messrs Warwick and Co. becoming bankrupts, their first and confidential clerk, and acquainted with the state of their affairs, and knew that the said Messrs Warwick and Co., long before the time of their becoming bankrupts, were unable to pay the debts due from them, and must have stopped payment if called upon to pay the whole or a considerable part of the debts due from them, being the substance of the evidence of the said Thomas Crook; or, that the said Master ought to have set forth the evidence of the said Thomas Crook at length.

The second exception was, that there did not exist any reason to believe that the purchase would be completed without delay.

And the third exception was, that this sum of 3200*l.* ought not to have been paid into such bank, or, if so, ought not to have been allowed by the defendants to remain in such bank.

Mr Pepys and Mr Lynch, for the exceptions, contended that Crook, the agent of the executors, knew the insolvent state of the bank. A

notice to the agent is notice to the principal. The moneys ought not to have been continued in the bank.

Mr Bickersteth and Mr Matthews on the other side.

*July* 23.—The MASTER OF THE ROLLS. Nothing would be more injurious to the interests of society, than the allowance of these exceptions. Mr Crook was employed by the testator, and the trustees only continued him. Can these trustees be liable to the losses occasioned by the failure of these bankrupts? Notice to the agent is notice to the principal, but then it must be in the character of agent. It can not be held that they were liable. Secondly, it is said that the stock was sold out before it was wanted. Now it appears by the contract, that the purchase-money was to be paid on the 22d March. [His honour here referred to some letters to the vendor's solicitors.] The trustees having received satisfactory answers to most of the inquiries, and in order that no time might be lost in completing the conveyance, sold out stock in August; from circumstances, the conveyance was not completed until February, and before that time arrived the bankers had failed. I am of opinion that it would be extremely injurious to the interests of society, that it would prevent persons from becoming trustees, were I to allow these exceptions. I shall therefore overrule them.

There were three other exceptions by the executors, in respect of sums which the Master had disallowed. The two latter were allowed, on the principle on which the plaintiff's exceptions were overruled; but the first of the executors' exceptions was disallowed, as not coming within it.

Reg. Lib. A. 1828. fol. 2652.

## Between John Cooper and Joseph Spratt, plaintiffs; and Fermin De Tastet and Louis Cabanon, defendants.

1 *Tamlyn*, 177.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, can not maintain a bill of interpleader.

But where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants.

*Westminster Hall*, Nov. 15, 1829.

THE plaintiffs were warehouse-keepers in Mark Lane. In April 1819, Messrs Bize, Bordenave, and Co. instructed them to land from the ship Sirene sixty-one bags of French wool, and warehouse them, which was accordingly done, and the wool was entered in the plaintiffs' books in the names of Bize, Bordenave, and Co. On the 14th of April the plaintiffs delivered to the order of Messrs Bize, Bordenave, and Co. six of the bags. On the 3d of July Messrs Bize, Bordenave, and Co. sent to the plaintiffs an order to transfer the remainder of the wool,

[reserving to themselves the privilege of drawing samples,] to the defendant De Tastet, and it was accordingly transferred into his name.

On the 6th of July Messrs Bize, Bordenave, and Co. sent to the plaintiffs an order for the delivery of certain samples of the wool, which was complied with.

The plaintiffs, on the 28th of August, received from Augustus Roehn a letter demanding the fifty-five bags of wool, offering to pay the warehouse charges, and to indemnify the plaintiffs for the delivery thereof, and stating that the defendant De Tastet had no claim whatever thereon. This was accompanied by another letter from Messrs Bize, Bordenave, and Co. confirming the statement in Roehn's letter, and requesting the plaintiffs to deliver the wools to Roehn or to warehouse them in his name, and that they would indemnify the plaintiffs for so doing. The letter was written by Rhoen as the agent of the defendant Louis Cabanon. On the other hand, the defendant De Tastet claimed the wool as his property. On the 20th of October the defendant Cabanon sent the plaintiffs a letter demanding the wool as his property, threatening an action if the same were not delivered to him, and giving notice that he had sold the wool, and offering to show the most clear evidence of his right.

The bill stated the preceding facts, and prayed that the defendants might interplead.

After the bill was filed the plaintiffs, with the consent of De Tastet delivered to the defendant Cabanon twenty-eight of the bags of wool.

The defendant De Tastet stated in his answer that he and Bordenave carried on the business of insurance and commission brokers, and in some few instances they carried on business as merchants under the firm of Bize, Bordenave, and Co.: that in the month of April 1819, Cabanon or Roehn consigned sixty-one bags of wool to Bize, Bordenave, and Co., in which firm he the defendant was a partner. The defendant also stated in his answer that the firm of Bize, Bordenave, and Co. made advances for Cabanon to the amount of 674*l.* 13*s.* 3*d.* on the credit of the proceeds to arise from the sale of the wool, and that the transfer was made to him in part satisfaction of a large sum of money lent by him to the firm.

Mr O. Anderdon for the plaintiffs.
Mr Koe for the defendant De Tastet.
The other defendant did not appear.

The Master of the Rolls. The plaintiff received these goods as the private agent of Messrs Bize, Bordenave, and Co. The possession of the agent is the possession of the principal. On the transfer to De Tastet the plaintiffs acknowledged themselves to be his agents. I am not aware of any instance of a bill of interpleader being sustained by a private agent. It is a very important point, and I permit the counsel to look into the authorities, and mention the result on Monday next.

*Nov.* 16.—Mr O. Anderdon for the plaintiffs.

This bill has been filed by warehousemen, whom I can not represent in any other character than that of agents. The wool was consigned by Cabanon to Bize, Bordenave, and Co., and after the latter had caused

the wool to be transferred to the defendant De Tastet, the defendant Cabanon claimed the goods as the owner; and in consequence of the lien claimed by De Tastet, it appears that there are in this case those conflicting claims arising out of the acts of the parties respecting which the parties ought to be compelled to interplead in this court. Mr De Tastet being a partner with Bize, Bordenave, and Co., this comes within the case of conflicting claims in which the holder of the goods can maintain a bill of interpleader. In the case of Nicholson *v.* Knowles, 5 Mad. 47, the Vice-Chancellor decided upon the principle of the cases of Dickenson *v.* Hammond, 2 B. & A. 310, and Roberts *v.* Ogilvie, 9 Price, 269, that an agent to receive particular moneys can not dispute the authority of his principal and set up inconsistent claims of third persons; but in such cases the receiver of the money would not be liable to an action at the suit of the parties who might be rightfully entitled to it. The plaintiffs ought to be protected in this court, because their delivery of the goods to De Tastet would not be an answer to the action of Cabanon, if De Tastet were not entitled to retain them.

Mr Koe, referring to the statement that De Tastet was a partner with Bize, Bordenave, and Co., objected, that it was not stated in the bill that De Tastet was a partner; but the Master of the Rolls thought that the plaintiff was entitled to read the fact from the defendant's answer.

Mr O. Anderdon. In Lowe and Richardson *v.* ——, 3 Mad. 277, it was laid down, that "although a captain might file a bill of interpleader where parties claimed adversely at law or in equity under a bill of lading, yet the Vice-Chancellor doubted whether he should in any case file a bill of interpleader where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the captain, and those who alleged an equity paramount to the bill of lading should assert it by a suit of their own." This appears to furnish the distinction. In Dowson *v.* Hardcastle, 2 Cox, 278, the plaintiffs were wharfingers, and the other parties were the consignor and consignee, and vendees of the goods, it was held that that was a proper case for a bill of interpleader. So, in Edenson and Roberts, 2 Cox, 280, which was the case of a bill of interpleader by a factor, against many defendants who had claimed the goods, in which the authority of the preceding case was recognized and followed. Martinius *v.* Helmuth,* before Lord Eldon, is a strong case to support this bill; and there are other analogous cases.†

The Master of the Rolls. You may cite many cases; but how do you state the principle?

Mr O Anderdon. Wherever conflicting claims are raised to property in the possession of a depositary arising out of the acts of the parties

* Reported in a note, 2 Ves. & Bea. 407, 2d edition, and in Cooper, 245.

† The cases of The East India Company *v.* Bazett, 1 Jacob, 91; Stevenson *v.* Anderson, 2 Ves. & B. 407; Martinius *v.* Helmuth, ibid, in note; and The East India Company *v.* Edwards, 18 Ves. 376.

claiming derivatively and in privity, he, not having the means of ascertaining in whom the right resides, is entitled to the assistance of a court of equity.

The MASTER OF THE ROLLS. Must not an agent account to his principal? How can a stranger maintain an action against an agent, if the latter deliver the goods deposited with him to his principal?

Mr O. Anderdon. Unless an agent is held to be not liable to an action of trover by a consignor, he ought to have protection here. In the case of Stevens *v.* Elwall, 4 M. & S. 259, a servant was held to be liable to an action of trover. In the case now before the court, the parties who are defendants claim under one title; and seeing the privity which exists between them, it is submitted that this bill can be maintained.

The MASTER OF THE ROLLS. The wool being deposited in a warehouse, the warehouseman becomes the agent of the principal, but if deposited in a bonded warehouse, the holder is the agent of the person entitled. When under the authority of the crown, the warehouseman is not a private agent, but a public warehouseman. The difference is, whether it is a warehouse or a public bonded warehouse.

(It was intimated to the court that the plaintiff's warehouses were bonded warehouses.)

Mr Koe. But it is stated on the record to be a private warehouse; that the plaintiffs carry on the business of warehousemen. There is nothing on the bill to show that this is a public bonded warehouse. It has been dealt with throughout as a private warehouse.

The MASTER OF THE ROLLS. Where would be the use of dismissing this bill, when another bill, on the ground that the plaintiffs' is a public bonded warehouse, may be brought to-morrow? If this be a private warehouse, the possession would be in De Tastet. If the plaintiffs are merely private agents, I am of opinion that they can not file a bill of interpleader; but if they are public agents they can file it. The agent of a bonded warehouse must be like the London Dock Company, who are public agents.

The cause then stood over, to enable the plaintiffs to make such application with reference to the fact of the plaintiffs' warehouse being bonded, as they should be advised.

*Nov.* 27.—Mr O. Anderdon stated, that with reference to this case he found that the goods were not deposited with the plaintiff as bonded goods.

The MASTER OF THE ROLLS. Then the plaintiffs are only private agents, and in that character they can not sustain a bill of interpleader.

Bill dismissed with costs.

## Bingham *v.* Woodgate.
## Hudlestone *v.* Corbett.

1 *Tamlyn*, 183.

A LORD of a customary manor *for life only*, purchased a tenement in the manor in fee, by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter. The manor, by the settlement under which he held it for life, was limited in default of sons in remainder to his brother; and the manor went over to his brother:

Held, that the usual mode of passing estates being by common-law conveyance, the freehold was in the tenant.

Held, that on the death of the lord the tenement descended to his daughter, his heiress at law.

*Westminster Hall*, Nov. 9, 1829.

## The Rev. Edward Davies and Mary Ann his wife, plaintiffs; and John Spurling the elder, Benjamin Colchester, John Spurling the younger, and William Bradey, defendants.

1 *Tamlyn*, 199.

Accounts having been settled, and a release executed, in order to avoid the latter, and obtain an account in this court, the plaintiff must establish either fraud or surprise.

One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor, he is not liable for moneys which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over.

In order to induce the court to give a decree to surcharge and falsify, some *one* mistake must be shown.

If an error is detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify.

Bill seeking relief on the ground of fraud or surprise—plaintiff failing to establish either—dismissed with costs.

How answers are to be read.

*Westminster Hall*, Nov. 28, 1829.

WHIMPER BRADEY, by his will bearing date the 3d June 1809, gave all his freehold and copyhold lands, except his freehold and copyhold parts of the church farm, (to which they were entitled in moieties in fee,) unto his brother John Bradey for his life; with remainder to the plaintiff Mary Ann Davies, then of the age of four years, in tail gene-

ral. The testator then declares, that if his brother should be minded to sell the church farm, he empowered him to sell all his parts and shares thereof; and if the same should not be sold in his lifetime, then the testator directed and empowered the surviving executors, as soon as might be after his brother's death, to sell and convey the same premises. The produce to be applied in like manner as the testator's personal estate. And the testator gave all his goods, chattels, and personal estate, and also the clear money arising by the said sale, unto his brother John Bradey for life, and after his death unto the plaintiff Mary Ann Davies. The testator appointed John Bradey, and defendants, John Spurling and Benjamin Colchester, executors of his will, and as far as by law he could, the testator committed to defendants Spurling and Colchester the custody and tuition of the plaintiff Mary Ann Davies, and the management and improvement of the real and personal estate by him devised and bequeathed to her, and the application thereof at their discretion, for her maintenance and education during her minority. Testator gave to Spurling and Colchester 50*l.* a-piece for their trouble.

The testator died in February 1817, and his will was proved by the three executors.

John Bradey sold the church farm for 6450*l.*

Benjamin Colchester, being by trade an auctioneer, sold the estate and *received the purchase-money.*

John Bradey, by his will bearing date the 17th day of May 1821, gave the greater part of his lands unto the defendants, Colchester, and Spurling the younger, to the use of them and their heirs, during the life of the plaintiff Mary Ann Davies, upon trust to pay her the rents independent of her husband; and after her decease to the use of her children, or more remote issue as she should appoint; and in default of appointment, to the children in fee, with an executory devise over.

The testator gave his personal estate to the plaintiff Mary Ann Davies, to be paid to her when she should attain twenty-one; a competent part to be applied to her maintenance and education during her minority.

Spurling the elder, Colchester, and Spurling the younger, were appointed executors and guardians of the plaintiff Mary Ann Davies during her minority. On the death of John Bradey his executors duly proved his will, and the plaintiff Mary Ann was then sixteen years of age.

John Bradey, up to his death, occupied and farmed a copyhold estate called Hollesley, which, in the lifetime of Whimper Bradey, was their joint property.

In August 1821, an amicable suit was instituted in chancery, for establishing the will and executing the trusts under which Spurling the elder, Colchester, and Spurling the younger were, by the court, appointed guardians of the plaintiff Mary Ann Davies.

The executors of John Bradey put in their answer with schedules of accounts, but no further proceedings were had in the suit. Mary Ann Davies, on attaining twenty-one, married the plaintiff, the Rev. Edward Davies.

This bill stated the preceding facts, and charged that a release given by the plaintiffs was executed through fear of misrepresentation, and

prayed that the wills of Whimper Bradey and John Bradey might be established, and the trusts carried into execution, and that the settlement of accounts, and the release might be declared fraudulent and void.

It was stated in the answers, that John Bradey alone, during his life, acted as executor and trustee of the will of Whimper Bradey, and that Spurling the elder and Colchester never in any manner acted or interfered in the execution of the will of Whimper Bradey, except by joining with him in signing the residuary account rendered to the stamp-office; that Benjamin Colchester was an auctioneer, and was employed by John Bradey to sell the estate, and he did sell it for 6450*l.*, which he paid into the bank at Woodridge to the account of John Bradey. John Bradey, by his cheque on that bank, paid Spurling the elder the sum of 2800*l.* in discharge of four bonds to that amount, entered into to him by Whimper Bradey and John Bradey.

The answers further state, that on the 9th February 1826, the accounts were investigated by Wm. Chapman on the part of the plaintiffs; and that thereby the sum of 666*l.* 6*s.* 7*d.* appeared to be due to the plaintiff Mrs Davies, exclusive of 700*l.* 3 per cent. consols; that a draft of the release was on the 15th February delivered to Mr H. G. Day, the then solicitor of the plaintiff Edward Davies. That the parties and the plaintiffs' accountant, Mr Chapman, met again on the 17th February, when Mr Davies signed a memorandum at the foot of the draft as follows: "I have heard this draft release read, and do approve the same, and do undertake to execute a copy thereof when engrossed on the proper stamp. Edward Davies. Witness, H. G. Day."

Spurling the elder, and Colchester, at the request of the plaintiff Mr Davies, then executed a power of attorney to sell out the 700*l.* stock, in order to pay some bills of Mrs Davies, and make some other necessary payments; and on the 24th day of February 1826 the accounts, with the subsequent receipt and payments, were fully gone into and settled, the release executed, and the balance paid to the plaintiffs.

These statements in the answer were supported by evidence.

At the foot of the accounts then produced there was written the following memorandum:—

"The foregoing accounts in this book have been examined by Mr William Chapman on our behalf, and we being satisfied therewith, and having this day received the balance of 358*l.* 8*s.* 2*d.* from the executors, do hereby allow the said accounts. As witness our hands, this 24th day of February 1826."

The plaintiffs' attorney was present, and the plaintiffs signed this memorandum.

It appeared also in the answer of Colchester, that the defendant Colchester had received from John Bradey the sum of 177*l.*, with which he was to purchase two cows for a relation of John Bradey, and to make some other payments; the remainder he was to keep to himself; and this defendant stated in his answer that he found a paper which he set forth, amongst the papers of John Bradey to that effect; but in the month of March 1826, considering that he ought to communicate the fact to the plaintiffs, he went to their solicitor, and stated all the circumstances to him, offering to do as Mr Davies wished. Mr Davies

wished to receive the balance, amounting to 132*l.*, and that sum, with interest, was paid to him in April.

The evidence that was material is fully stated by the Master of the Rolls in his judgment.

Mr Bickersteth and Mr Parker for the plaintiffs.
Mr Knight and Mr Turner for the defendants.

Whilst counsel was reading evidence from the answer at considerable length, the Master of the Rolls stated that there had been great abuses in the modern practice regarding answers. If, said his honour, the plaintiff reads a particular passage, and the defendant refers in the same passage to matter that is explanatory, the defendant has a right to read the explanatory matter; but unless the sense be connected, it is not necessary to read on merely because such words as "but," "however," "and" were used.

It was stated by the counsel on both sides, that very considerable expense was incurred in the examination of witnesses by reason of the mode which for some time had been adopted in drawing answers, by connecting various passages, however independent the facts contained in them were of each other. And all the counsel expressed their satisfaction that the court had laid down a rule upon the subject.

His Honour afterwards added, if you read a passage in an answer to charge the defendant, and it is by a connecting passage satisfactorily met by the defendant, you must discharge him by the same answer.

The Master of the Rolls. This is a bill filed by the plaintiffs for the purpose of avoiding a release which they have executed on the settlement of accounts between the plaintiffs and the defendants, and of having the accounts retaken under the decree of this court.

In order to avoid the release, and to obtain an account under the decree of this court, it is necessary that the plaintiffs should establish that there was either fraud or surprise in the settlement of the accounts upon which the release proceeds.

Surprise is certainly not established in this case, because previous to the execution of this release, namely, on the 10th February 1826, the accounts were examined by an agent appointed on the part of the plaintiffs for that purpose, and with those accounts they expressed themselves perfectly satisfied. Subsequently, about seven days afterwards, a draft of the intended release proceeding upon that settlement of accounts, was approved by the solicitor of the plaintiffs, and the release was afterwards executed, on the 24th February, in the presence of that solicitor for the plaintiffs who had approved of the draft of the release. There is, therefore, no ground to state that this release on the settlement of the accounts proceeded upon surprise. The remaining question for the purpose of opening the accounts is, whether it proceeded upon any fraud upon the part of the defendants.

It is said to be plain that there was fraud on the part of the defendants, because on the day that this release was executed, namely, on the 24th February, there was a written assurance on the part of the defendants that the accounts which ascertained the balance stated in the release had been fully examined by a Mr Chapman, and approved by

him; and that it was in consequence of that examination and approval that the plaintiffs did in fact execute the release. But it does appear to me that this was no fraud on the part of the defendants, nor did it in any manner mislead the plaintiffs, or induce the plaintiffs to sign the release in question.

Mr Chapman had examined these accounts, as he says, on the 10th February, as it is proved by other witnesses, the examination took place on the 9th February, and in his examination he states a balance of 700*l.* and a fraction as being then the result of the accounts. The balance as stated by Mr Chapman, is a balance which does appear to have been due from the defendants up to that 9th February upon the account on which his examination proceeded, and there is in that respect, therefore, no difference between the parties. The balance that was actually due on the 24th, when the release was executed, was a different balance from that which was stated by Chapman, there having been additional articles on both sides of the account. Now it appears that the plaintiffs were perfectly well aware that there were such additional articles on both sides of the account. In truth those additional articles were the result of a desire expressed by the plaintiff, Mr Davies, that certain debts which had been incurred by his wife and co-plaintiff should be discharged before the final settlement of the accounts and the execution of the release took place. It appears to have been stated, that Mrs Davies had incurred certain debts to the amount of 200*l.* or 300*l.*, and it was then made a question, whether the settlement of the accounts should be concluded, and it should be left to Mr Davies, he being then married, to pay those debts, or whether those debts should be paid by the defendants, the executors? And it was at the request of Mr Davies himself that the executors undertook the payment of those debts. Now, in order to pay those debts, it was necessary to provide means: it became necessary to sell a certain sum of stock which stood in the names of the executors, and with that stock those debts were paid. The additional articles to the account are, therefore, on the one side, the money produced by the sale of that stock, and on the other side the application of those moneys to the payment of the debts. It appears that those additional articles were submitted to Mr Day, the solicitor on the part of the plaintiffs; that he was apprized of them; and that they were fully explained to Davies himself on the day that he executed the release. In this respect, therefore, although the memorandum is certainly incorrect—because, according to the memorandum, the whole accounts had been examined by Chapman, whereas in fact the accounts examined by him extended only to the 9th February, and not to those additional articles—yet it is plain that the parties were fully aware that by the examination of the accounts by Mr Chapman, was meant that examination only which Mr Chapman had actually made, and that it was not meant to include those additional articles which had been inserted principally at the request of the plaintiff himself after the examination by Mr Chapman. On this ground, therefore, it is not to be stated that there was any fraud. It is said, however, that there was fraud, because the plaintiff, Mrs Davies, was entitled not only to an account of the estate of John Bradey, but an account of the estate of Whimper Bradey, and that the only account which Mr Chapman ex-

amined was the account of the estate of John Bradey, and the information, therefore, with respect to the estate of Whimper Bradey, to which she was entitled, was not duly afforded. It appears from the evidence that John Bradey was one of the executors of Whimper Bradey, with two of the defendants, and that he was in truth the sole acting executor of Whimper Bradey; that he possessed the whole of his property, and alone administered that property. It is quite immaterial, therefore, whether there was any correct examination of the accounts of the estate of Whimper Bradey, because as John Bradey had alone administered that estate, whether he had administered it properly or improperly, he was the person whose assets must answer for his administration; and if the whole of the assets were administered, it was perfectly immaterial what had been the administration of the estate of Whimper Bradey.

Then, let it be said that his administration was most incorrect, the estate of John Bradey must answer for that incorrectness. It could answer for that incorrectness only to the extent of his property, and the account of the estate of John Bradey, therefore, would be all the plaintiffs could obtain, whatever had been the mal-administration of the estate of Whimper Bradey. It is not stated in the evidence, but it is perfectly manifest that it must have been fully explained to the plaintiffs, because the release itself purports to be a release, not as to the estate of John Bradey alone, upon whose accounts the release proceeded, but as to the estate of Whimper Bradey also. Now, the plaintiffs could never have executed that release, taking the balance of John Bradey's estate as the balance of the two estates, except the circumstance which I have stated had been fully explained to them, and the extent of that demand had been shown to be necessarily confined to such balance as should appear to be due from the estate of John Bradey. All the information, therefore, that was essential to the justice of the case must, upon the facts, be taken to have been given to the plaintiffs before they executed this release. But it is said, although the plaintiffs might have no remedy with respect to the administration of John Bradey except to the extent of the property, and taking the whole of his property they could take nothing else as it regarded him, yet still there might have been a mal-administration on the part of the executors, which would have made the executors personally liable; and the material ground upon which that statement is made raises a question of some nicety and difficulty. Whimper Bradey and John Bradey had been partners in their farming concerns. They were partners in the property upon which those farming concerns were conducted. They had in moieties a considerable estate. Whimper Bradey, by his will, making John Bradey one of his executors, also gave him a power to sell the moiety of an estate which they held jointly, for the purpose of converting it into personal estate, and John, after the death of Whimper Bradey, accordingly executes that power. He sells that moiety of the estate, and he sells also his own moiety of the estate. He puts up the whole estate to sale, and it produces a sum of 6450*l*. In this sale he employs one of the defendants, who was a co-executor with him under the will of Whimper Bradey, and was an auctioneer. He employs him for the purpose of the sale of this estate. It so happens, that there is no price bid at the auction which is thought a reasonable price for this property, and it is afterwards sold by private contract by the defendant, the auc-

tioneer; who is subsequently employed by John Bradey, as his agent, to receive the money from the purchaser; he accordingly does receive the 6450*l.* and pays it over to John Bradey.

Now it is said, that, having received this 6450*l.*, and being an executor under the will of Whimper Bradey, who had desired that his moiety of the estate might be converted into personal estate, he ought never to have parted with the produce of that moiety which Whimper Bradey's share had produced, but that he should have retained it as executor under Whimper Bradey's will, for the purposes of his will, to be administered in the payment of his debts; and that, having paid it over to John Bradey, if John Bradey had been guilty of any mal-administration of this property, so handed over to him by his co-executor, he, as co-executor, was to be answerable for John Bradey's mal-administration. Now it is extremely true, and perfectly well settled upon the principles of this court, that if there be more than one executor, and one executor receives part of the personal estate, and afterwards hands it over to a co-executor, who wastes the property so handed over to him, the executor who did hand it over, is personally liable for the abuse of trust in the other executor; because, having once possession of the money, it was his duty to see that it was secured, so as to be properly applied in administration, and he ought not to have given to his co-executor the power to waste it.

That principle is perfectly well settled, and the question is, whether it reaches this case? The co-executor, who receives money in that character, has a legal right to retain it against his co-executor; and it being his duty to protect the property in respect of which this trust of executor is reposed in him, if he does not protect the property, but places it in a situation in which it may be wasted, then he is to be answerable; but he is to be answerable because he had the legal right to retain it, and he did not avail himself of that legal right, but handed it over to his co-executor, who wasted it. Now, had this defendant, the auctioneer, a legal right to retain this money from John Bradey? He possessed it in the sole character of agent of John Bradey. As executor, he never could have possessed this money; it was the produce of the real estate, which partly belonged to J. Bradey and partly belonged to Whimper Bradey, who by his will had authorized John Bradey to sell that moiety of the estate which was his property. The auctioneer or agent, therefore, who received this money in its passage from the purchaser to the vendor, John Bradey, did not receive it in the character of executor. As he received it in the character of agent of John Bradey alone, he never could have legally retained it against John Bradey, if John Bradey had thought fit to take proceedings for the purpose of compelling him to pay to J. Bradey the amount of that money. Now this being the case, I am of opinion that the auctioneer, the defendant, the co-executor, was perfectly justified in paying over the money to John Bradey; and that if there were any mal-administration of that property by J. Bradey, that he, the co-executor, is not liable in that respect.

It was said also that there was mal-administration by John Bradey of his brother's estate, with respect to the payment of a certain debt due to the co-executor Spurling.

In order to establish that fact of mal-administration, the only evi-

dence resorted to on the part of the plaintiffs was the answer of the defendant; but the answer of the defendant, that part of it which was necessarily read, not only amounted to evidence of the existence of the debt, but of the legal right of Mr Spurling to claim that debt of John Bradey, partly in his own right, and partly as executor to his brother, it being a joint debt due from the two brothers to Spurling. Now the plaintiffs have no other evidence than the answer, and the answer discloses a case which makes out the payment to be a most correct payment. It is not necessary to make any further observations on the subject, because the evidence by which a debt is proved, at the same time proves the correctness of the transaction with respect to it. There is, therefore, not only no surprise with respect to this release, and no ground for opening the accounts on that head, but there is no fraud established, upon which the court would be justified in avoiding the release, and in opening the accounts. But then it is said, that if the case be not sufficiently strong to open the accounts, it is yet sufficiently strong to induce the court to give a decree to the plaintiffs to surcharge and falsify those accounts. Now in order to induce the court to make a decree that the plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established, in the progress of the suit, some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being, in the view of the court, a reasonable inference, that if there be one mistake there may be many mistakes; and the plaintiffs, therefore, ought to have the liberty of entering fully into those accounts, with a view to proving other mistakes. It happened that Mr Colchester, one of the defendants, the executor, was also the agent of John Bradey. He was an agent employed by him in the management of the farming concerns, and at the death of John Bradey there was in his hands a sum of money, [174*l.*,] which was due from Mr Colchester as agent of John Bradey. It appears in evidence that John Bradey shortly before his death had told Mr Colchester, that he was to make a particular application of part of his property in favour of some of his relations, and that he was to keep the residue for his own use and benefit. And it appears further, that there was found amongst the papers of John Bradey a written memorandum, by which Mr Colchester was authorized to make these payments in favour of the relations of John Bradey, and was desired to retain the rest. Mr Colchester, acting upon these facts, did not, when the accounts were made out, which Mr Chapman examined, introduce any part of this sum of 174*l.* into the accounts; but about a fortnight afterwards he disclosed to the plaintiffs the particulars of this transaction, and explained to them that he did not introduce that sum into the accounts, because he considered that he was acting fairly according to the directions of John Bradey, by retaining to his own use that part of it which John Bradey had not directed him to apply to the benefit of his relations; that, therefore, he had not introduced into these accounts, and that there was, after the application in favour of John Bradey's relations, a balance of 132*l.* remaining in his hands; that if the plaintiff (Mr Davies) thought that he, Mr Colchester, ought not to retain this 132*l.* for his own benefit, he was quite ready to pay it to him; and he left it to Mr Davies to say how he should apply this sum of 132*l.* The plaintiff, Mr Davies, thought that,

under the circumstances, he was justified in demanding from Mr Colchester this 132*l.*, and it was accordingly paid to him by Mr Colchester within a short period after this release was executed, and the accounts settled. Now it is said that if this 132*l.* had not been paid over before the institution of this suit, but in the progress of the suit, it would have been a plain error in Mr Colchester's account that he had kept back this 132*l.*, and that if it had been established in the suit, the court would necessarily have been driven to a decree to authorize the plaintiff to surcharge and falsify the accounts. That is perfectly true, supposing the court should be of opinion that Mr Colchester was not justified in retaining it, and for the purpose of considering the argument of the plaintiffs, it may be conceded that Mr Colchester was not justified in retaining this 132*l.* The plaintiff contends that it makes no difference that that sum was paid previous to the institution of the suit, because it was equally an error in these accounts; and, consequently, that notwithstanding the previous payment, the plaintiffs are now entitled to a decree to surcharge and falsify.

I can not follow the reasoning of the plaintiffs in this case. If, in the progress of a suit, an account upon which the defendants insist, is proved to be in any degree erroneous, erroneous even in any one item, then the plaintiffs are entitled to a decree to surcharge, and falsify; but here the plaintiffs have not established, in the progress of this suit, that there is any error in the account.

There was originally an error in the account, but this error has not been detected in the suit; the plaintiffs, therefore, are not relieved under the decree of the court against this error, but by an arrangement made out of court this error has been corrected. The error having been corrected out of court, and before the institution of the suit, I am of opinion that it is not a foundation upon which the court ever has, or ever would be justified in giving to the plaintiffs the liberty to surcharge and falsify.

Upon the whole, I am of opinion that this bill must be dismissed, and that it must be dismissed with costs.

Reg. Lib. A. 1822. fol. 170.

## Between Mary Ann Brough, plaintiff; and Margaret Oddy, defendant.

1 *Tamlyn*, 215.

The plaintiff having parted with title-deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor.

On a bill for specific performance and adequate security:

The annuity fell into arrear, and the plaintiff paid it.

Held, that, the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed.

*Westminster Hall*, Nov. 23, 24, 1829.

IN the month of March 1823, the plaintiff held certain title deeds, which had been deposited with her by John Brough the elder, to whom

the same belonged, under a verbal agreement that the plaintiff should hold the same as a security, to the intent that she might have an equitable lien for a debt of 900*l.* due to her from him, with lawful interest thereon; the whole of which debt, with some interest thereon, in the month of March 1823, remained due to the plaintiff. In March 1823, John Brough the younger, son of John Brough the elder, was desirous of raising a sum of money for his own use by the sale and grant of a life annuity, and the father agreed to join with his son in granting and giving security for the payment of such annuity. John Brough the younger, some few days previously to the 7th March 1823, on behalf and with the privity of John Brough the elder, requested the plaintiff to deliver up the deeds which had been deposited with her, for the purpose of enabling him and his father to raise such intended sum of money for the use of the son, by means of the grant of an annuity which he represented he and his father were desirous to secure by an assignment of the premises comprised in such title deeds, so that such assignment might take priority over the lien of the plaintiff on the premises. And in order to induce the plaintiff to part with the deeds, John Brough the younger proposed that the defendant should give an indemnity (as after mentioned) to the plaintiff against the consequences of any default being made in payment of such intended annuity, and the defendant consented to enter into an agreement with the plaintiff to indemnify and guarantee her to the extent of 30*l.* per annum in the event of any default being made in payment of the annuity proposed to be charged on the premises comprised in the title deeds, in order to preserve the premises from being actually resorted to and taken by such annuitant under the trusts of the annuity deed; the terms and provisions of which agreement were contained and specified in a letter which Margaret Oddy wrote and sent to the plaintiff, which is as follows*:—"Blackheath Hill, March 7th, 1823, Madam, At the request of my son-in-law Mr John Brough, I beg to state that I am willing, in the event of his raising money by means of the security which you have lent to him, to become guarantee to you for the amount of 30*l.* per annum during the continuance of that bond, it being understood that in the event of Mr Brough becoming possessed of any property in right of his wife, that property to be appropriated to the discharge of the bond, and that I shall be from that time exonerated from further responsibility;" which letter was signed by Margaret Oddy.

John Brough the younger gave the plaintiff the following receipt for the deeds:—"Received of Mrs Mary Anne Brough the lease of all my property situated in Islington, which had been placed in her hands as security, as also the counterpart of the lease of a house let to Mr Cincliffe at 48*l.* 10*s.* per annum, for the purpose of assigning that sum in payment of an annuity which I hereby engage to return so soon as that purpose is accomplished. John Brough."

The father and son were thereupon enabled to obtain, and did obtain,

* This letter not being stamped, could not be given in evidence. The agreement was stamped with an agreement-stamp; but it was objected by the defendant's counsel, that it ought to have been stamped with a stamp applicable to annuities, and to have been enrolled: however, the case having been determined on the principal point, these objections were not noticed.

for the use of the son a sum of 500*l.*, upon the grant of an annuity of 40*l.* to one William Wilmshurst.

Pending the treaty with William Wilmshurst for the annuity, a memorandum of agreement in writing was prepared by John Brough the younger, and signed by Margaret Oddy, which is as follows:—"By these presents be it known, that under the following considerations and with the conditions hereinafter specified, I, the undersigned, Margaret Oddy of Blackheath, in the county of Kent, do hereby engage and make myself responsible to Mrs Mary Anne Brough of No. 42, Lamb's Conduit street, London, for the yearly payment of the sum of 29*l.* 19*s.* 6*d.* of lawful money of Great Britain; whereas the said Mary Anne Brough hath yielded up to Mr John Brough of High Wycombe, in the county of Bucks, for his use and benefit, certain securities, which were placed in her hands by Mr John Brough the elder of No. 8, Lancaster street, Burton Crescent, for securing to her the due payment of a certain sum; and whereas the said John Brough hath by means of those securities raised a sum of money for his benefit on annuity, for the due payment of which annuity those securities are made liable, I, the beforementioned Margaret Oddy, do hereby engage to pay the said Mary Anne Brough the sum of 29*l.* 19*s.* 6*d.* annually, by quarterly payments, in the event that the before said John Brough doth not duly pay the said annuity, and by cause of which non-payment, those securities shall be taken for that purpose, it being understood that whereas the said John Brough is by virtue of his marriage with my daughter, entitled under certain circumstances and conditions to become possessed of a sum of money, part of my present estate, that should he come into possession of such money, that from and after that time this bond shall be null and void. Blackheath, April 14th, 1823. Margaret Oddy."

Default was several times made in payment of the annuity to William Wilmshurst, but the same was eventually paid by the two John Broughs, or one of them; default being made in payment of the quarterly portions of the annuity which became due on the 14th October 1826, and 14th January 1827, the plaintiff, in order to prevent a sale of the premises, with her own moneys paid to William Wilmshurst the two quarterly payments of the annuity in arrear, to the amount of 20*l.* This sum was afterwards repaid to the plaintiffs by John Brough the younger; but default was made in payment of the three next quarterly payments of the annuity, and the plaintiff, in order to prevent a renewal of the threatened proceedings on the part of William Wilmshurst, paid the same to the amount of 30*l.*

The bill stated the preceding facts, and that John Brough the younger had taken the benefit of the insolvent debtors' act, and prayed a specific performance of the agreement, and a reimbursement of what the plaintiff had already paid on account of the annuity. And that the defendant might be decreed to give the plaintiff some adequate security for her reimbursement or indemnity as the court should think fit.

The defendant, by her answer, admitted the letter of the 7th March 1823, but denied that such letter was ever meant to bear the construction which had been put upon it by the complainant, or that the defendant ever intended to guarantee any payments to be made by the complainant in respect of the annuity, other than such as she might or should be legally compelled to pay. And that such guarantee was never in-

tended by her to be extended to payments which the plaintiff might *voluntarily* make for or on behalf of the said John Brough the younger, and which she was under no legal necessity to make.

The defendant admitted signing the agreement, and submitted, that if she was liable upon such guarantee, the plaintiff's remedy was at law. And denied the plaintiff's right to have the specific performance prayed.

A witness deposed to the payment of three sums of 10*l.* each by the plaintiff on account of the annuity, and that the sum of 22*l.* 14*s.* remainded due to the plaintiff.

Mr Pemberton, and Mr Girdlestone, junr., for the plaintiff.

The plaintiff held certain deeds as a security for the sum of 9000*l.* The younger Brough wanted to raise money, and he and his father concurred in applying to the plaintiff for the deeds; but she refused without some guarantee that she should be indemnified against the annuity about to be granted by the Broughs. And the defendant indemnified her by a guarantee in a letter, dated 7th March 1823, written by the defendant to the plaintiff. The defendant is the mother-in-law of Mr John Brough the younger. It is confessed in the answer that the plaintiff had given up the deeds, and it is for that act the guarantee was given. It is a necessary inference from the agreement that a security should be given to the plaintiff, although the agreement is very inartificially expressed. Parrot *v.* Wells and wife, 2 Vern. 127; and Ranelaugh *v.* Hayes, 1 Vern. 189;—these cases do not strictly apply, but they show how far the court has gone in cases of indemnity; the plaintiff was induced to give up the deeds in consequence of this guarantee.

Mr Pepys and Mr Wright, for the defendants.

The plaintiff's remedy is in a court of law; does the court exercise its jurisdiction simply on a contract to pay a sum of money? the court of equity never has exercised any such jurisdiction, and it is to be presumed never will; the contract is, that if the annuitant claims the annuity against the estate, then the defendant should pay, the plaintiff has no right to a further security.

Mr Pemberton in reply.

The difficulty I have to contend with is, whether it is not a mere question at law. It is not necessary to show that the property has been seized in execution, the defendant being at liberty to make those payments which would protect her own property. And it is not disputed that payments have been made by her.

The Master of the Rolls.—The question here is, whether the court is under a necessity of sending the parties to a court of law. [His honour here read the agreement.] It is said that the event has happened upon which the payment was to take place. For the purpose of considering the question, whether the court can entertain this case, we may suppose that the event has happened. It is said that this is a case for equitable interposition, and that the court will compel the defendant to give a complete security. I am not aware that the court has gone any such length, if the parties choose to satisfy themselves with a per-

sonal obligation, the court will not give more; there is no engagement here to indemnify, but only to pay a certain sum. I am of opinion, that the plaintiff must be left to her remedy at law, that she has no case for equitable jurisdiction, and that the bill must be dismissed, and with costs.

**Between Henry Godfrey, D. D., President or Master of the College of St. Margaret and St. Bernard, commonly called Queen's College, in the University of Cambridge, and the Fellows of the same College, plaintiffs; and Thomas Bridge Littell, defendant.**

1 *Tamlyn*, 221.

Where a plaintiff shows a title to some land and a confusion of boundaries, he is entitled to a commission or an issue. In this case a commission was directed.

*Westminster Hall*, November 17, 1829.

QUEEN'S COLLEGE, at Cambridge, is seised in fee of the manor of Horsham Hall, in the county of Essex.

Certain fields called Lacy Fields are parts of this manor, and the college was accustomed to demise them from time to time for a term of twenty-one years, in consideration of a fine and yearly rent.

The defendant became the tenant of those fields in or about the year 1778, under a lease granted by the college, and given to the defendant by the Rev. William Collier, who was the executor of Sarah Bridge, an ancestor of the defendant, and the defendant continued tenant of the property under that lease until Michaelmas 1789, when the college granted him a further lease for twenty-one years, and he occupied the farm up to the time of the expiration of that term in 1810. The quantity in the leases was described as three score acres, but the college contended that the real quantity was seventy-one acres and a half, whilst the defendant would only admit it to amount to forty-five acres, including the chaseway; and averred in his answer, that an acre, by estimation, of uninclosed lands in Cambridgeshire was only three roods; and from a circumstance stated by him, he concluded that the Lacy Fields were formerly uninclosed, and common or open field. The college also insisted, that two fields called the Oxleys, to the north of a chaseway, containing about twenty acres, were parts of the Lacy Fields, which, however, was positively denied by the defendant, who, in 1810, only gave up to the plaintiffs the six fields lying to the south of the chaseway, containing forty-one acres. It appeared that at the expiration of the last lease, the college claimed more land than was given up by the defendant, and brought an ejectment, which was afterwards abandoned.

The bill charged, that by reason of the fraudulent matters mentioned in the bill, the plaintiffs were deprived of any remedy at law in the premises, and that the college must be deprived of its just rights unless

this court should issue a commission to ascertain the boundaries of the lands belonging to the college and to the defendant respectively.

The bill prayed, that the defendant might answer and discover the matters of the bill, and that the farm called Lacy Fields and the boundaries thereof, might be distinguished and ascertained under the direction and decree of the court, and that for that purpose a commission might issue. The bill also prayed for an account of rents. On the part of the plaintiffs there was given in evidence an account or terrier, whereby Thomas Bridge, an ancestor of the defendant, after noticing that the farm called Lacy Fields did contain by estimation sixty acres or thereabouts, certified that the farm so estimated contained by admeasurement seventy-one acres and a half.

Several witnesses were examined on both sides as to the reputation of the ownership of the land on the north side of the chaseway, some of them deposing that the whole of it was the defendant's own property, whilst others deposed to a reputation, that one of the closes, numbered 9 on the map produced, and two acres, part of a close numbered 8, belonged to the college.

On the part of the plaintiff, Francis Minot, aged seventy-seven, proved that he lived one year with the defendant's father when thirteen years of age, and had since resided about two miles from the farm; that the Lacy Fields contained, as he had heard and believed, sixty acres, statute measure, and were situated in the parish of Hendycamps; that the chaseway passes through the Lacy Fields, twenty acres on the right side and forty acres on the left side, and that the property or ownership thereof was reputed to belong to Queen's College. His grandfather, who was bailiff to the college, once told him, on going over Lacy Fields, that the fields on both sides the chaseway were what they call Lacy Fields, and that deponent believed it to be true.

John Unwin proved, that part of Lacy Fields was in Hendycamps, and part in Steeple Bumstead, in Essex, and consisted *of forty acres*, as he had always heard and believed; and that the Lacy Fields lie altogether on the left hand of the chaseway; that the price of the land numbered 9 and two acres of No. 8, which No. 8 was formerly called Middle Oxleys (on the north of the chaseway) were the property of Queen's College; but deponent never knew they were considered part of Lacy Fields; that No. 9 contained about eleven acres and that fifty years ago there was no fence between No. 8, and No. 9; that the residue of No. 8, with a piece of land called Lower Oxleys, and other lands called the Haverhill, belonged to the defendant; and he recollected some timber having been felled about sixty years ago on No. 9, by a person whom he understood to be the college woodward.

Thomas Darkin, aged fifty-nine, deposed that part of the Lacy Fields lay on the right hand side of the chaseway, and when he first knew the same it was in one piece of ploughed land called Short Lands, or Short Ten Acres, and contained ten acres or thereabouts. And this witness also deposed, that about twenty years since he was at work thereupon, when the defendant, in answer to a question put to him by the witness, said that it did belong to Queen's College.

On the part of the defendant several witnesses, some of them very old, deposed, that the Lacy Fields all lay on the south side of the chaseway; and one of them deposed, that Lacy Field belonged to the plain-

tiffs, and that he had heard Joshua Clayton, the woodward of the defendant's father, say, that the Upper Oxleys was said to belong to the plaintiffs. Two of the defendant's witnesses, one of whom had been tenant to defendant's father, and the other was the son of a tenant, also proved that timber had been cut by those tenants on the Oxleys by the permission of defendant; but the plaintiffs had cut timber on the Lacy Fields only. The respective sons of two other tenants of Lacy Fields and other lands also deposed, that the Lacy Fields lay on the south side of the chaseway, and contained about forty acres, and that the lands of the plaintiffs were always reputed in the neighbourhood to lie entirely on the south side of the chaseway. It appeared, that the defendant's father, in his lifetime, always let Lacy Fields with various other lands, in one holding called the Nesterfield End Farm. A land-surveyor proved a map he made for the plaintiffs about thirty-five years since of the parish of Hendychamps. He also proved that he was present at a meeting in 1811, which was attended by the bursar and two other officers of the college, for the purpose of finally settling the matters in dispute; and when the meeting broke up, he considered the matter to be settled in favour of the defendant. Some witnesses on the part of the defendant proved, that an estimated acre of uninclosed land in Cambridgeshire was about one fourth or one fifth less than the statute measure, and this was confirmed by some of the plaintiffs' witnesses.

Mr Rose, Mr Tinney, and Mr Loftus Lowndes, for the plaintiffs. The owner of this field, called Lacy Fields, in the reign of Henry VIII. admitted that it was *sixty* acres, but there is only now given up to us forty acres: we find the defendant in the possession of lands immediately abutting, and ancient witnesses have proved that Lacy Fields lay as well on one side the chaseway as on the other. This family have been in possession ever since the reign of Henry VIII.; and the plaintiffs have shown, by strong evidence, that some part of the lands on the north side does belong to the college, but there is no decisive evidence what part of the close No. 8, does belong to it; there is so much difficulty in determining what lands belong to the college, that the plaintiffs call for the assistance of this court.

Mr Bickersteth, Mr Pemberton, and Mr Skirrow, for the defendant. The defendant left his holding in 1810, and this bill was not filed until 1825: In 1811 this very subject was discussed; and both parties having shown their respective papers, the matter was amicably settled between them; the officers of the college being satisfied, from the documents produced, that the college had no claim to lands on the north side. The bill charges a fraudulent retainer, but the plaintiffs have failed in any proof of this. Then the case comes to an accidental confusion of boundaries, for that this road, the chaseway, forms the boundary between the defendant' lands and the Lacy Fields belonging to the plaintiffs; but the whole colour of the plaintiffs' case is, that in their ancient leases the field is described as being sixty acres, and they have produced evidence of terriers that the field was seventy-one acres; but they not have proved that the estimated measure was equal to sixty statute acres: an acre by estimation in the open fields of Cambridge

consists of three statute roods, and this property fifty years since was an open field. Lacy Field lies altogether on the south side of the ancient road; the lands on the north side are called Oxleys, and have been so from the most ancient times, as has been proved by the witnesses: the Oxleys are part of the manor of Horsham Hall, of which this college is the lord. About thirty-five years since a map was made of several properties in the parish, and in that Lacy Field stands as it is now found. The college did not object to it: the college might have brought an ejectment.

The MASTER OF THE ROLLS. That is the strong point of your case. How can I send a commission, when upon the plaintiffs' own evidence some of their witnesses swear to one thing, and others swear to another? That the plaintiffs are entitled to something, appears by the evidence of all their witnesses; I do not see any thing in the way of an ejectment.

Mr Pemberton. By a case in the second volume of Mr Merivale's Reports, Speer *v.* Crawter, 2 Mer. 418, a confusion of boundaries was held not to be sufficient ground for issuing a commission.

The MASTER OF THE ROLLS. The difficulty is the quantity, for I believe the commission always states the number of acres which the commissioners are to set out.

Mr Pemberton contended, that the terrier might have referred to Lacy Field and other lands.

Mr Skirrow. It is submitted, that the plaintiffs have not proved the allegations in their bill, that the defendant has destroyed the fences, and not protected them. The plaintiffs come with a very bad grace into this court after fifteen years. The origin of this bill is on the writ *nuper obiit*. It is impossible for the plaintiffs to sustain their bill.

The MASTER OF THE ROLLS. One of the witnesses swears that the plaintiffs are entitled to two acres, part of No. 8; another evidence is, that the plaintiffs are entitled to ten acres north of the way; now No. 9 is not that quantity, and there must be a confusion of boundaries in No. 8.

The court directed the case to stand over to another day, to produce precedents that issues had been directed in similar cases; and the plaintiffs' counsel were to be at liberty to produce precedents that it was customary to issue a commission without naming the number of acres.

*Rolls*, Dec. 3. Mr Skirrow. The plaintiffs allege that the defendant had removed the boundaries, and that therefore they were unable to proceed at law; but in order to obtain relief in this court they must prove themselves entitled to a certain quantity of land, which they have not done. The plaintiffs have examined seven witnesses; first, Francis Minot, who proved that his grandfather told him that the fields on both sides of the chaseway were what were called the Lacy Fields, but evidence of reputation can not be given as to one particular fact; the evidence of the

other six witnesses is to very little effect, and is contradictory: the plaintiffs ought to bring an ejectment. In the case of The Bishop of Ely *v.* Kenrick, Bunb. 322,* the defendant not admitting the plaintiff's title, but denying it, the bill was dismissed; so again in Chapman *v.* Spencer, 2 Eq. Ca. Abr. 163, it was decided that the plaintiff must first establish his right, before a commission could be granted, and if the right be not settled, the party will be left to his remedy at law. The defendant has proved, that in 1810 the matter was fully entered into, and proceedings in ejectment, which had been commenced, were withdrawn. It is in evidence that the then bursar was fully satisfied, and it is therefore submitted, that this is not a case for the aid of a court of equity. By all the witnesses examined on the part of the defendant, it has been proved that the Lacy Fields lie on the left hand side of the road only, and not the right; and if that be true the plaintiffs' case must fail. The plaintiffs on the record allege that they have a clear legal title; they have, therefore, a clear remedy at law. In all the cases in which the court has directed issues, it has been at the request of the defendant; whenever the court has directed an issue, it has been "whether ninety acres, or any other and what quantity, of land belonged to the plaintiff." The plaintiff having first produced evidence in this court that he was entitled to ninety acres, the case of Hilton *v.* Windsor, decided on the 20th December 1822, and not yet reported, is in point. It is submitted, upon authority and upon principle, that the plaintiffs may now bring their ejectment, and ought to have recourse to that remedy.

Mr Rose and Mr Tinney cited the cases of The Duke of Leeds *v.* The Earl of Stafford, 4 Ves. 180; The Attorney-General *v.* Bowyer, 5 Ves. 300; Lethieullier *v.* Lord Castlemain, 1 Dickens, 46; Metcalf *v.* Beckwith, 2 P. W. 376; Willis *v.* Parklington, 2 Mer. 507.

They also cited the following MS. cases, Norris *v.* Le Neve, 1742; Attorney-General *v.* Bowyer, 3d March 1800; Millard *v.* Panconst, decided 7th August 1794; Robinson *v.* Hodgson, decided 17th December 1800; and Clifton *v.* Gwynne, decided 12th December 1822. When the copyholder is tenant of the lord he is bound to take care of the boundaries, and the landlord is entitled in this court to have that justice which he can not have without it. In none of the cases cited was the question of quantity discussed, but it is submitted that those cases are a sufficient authority to show that a specific number of acres need not be set out.

Mr Skirrow in reply.

In the cases cited, the plaintiff's title was admitted by the defendants; with respect to the case of Lethieullier *v.* Lord Castlemain,—it is also reported in the cases in the time of Lord King,—there the defendants admitted the legal title; here the defendant denies it: where the title is denied, the plaintiffs must prove a title to a specific quantity, and then the defendant may have a commission for partition. The cases are very well arranged in 1 Eden, 337; Wake *v.* Conyers, 3 Ves. 119.

* The bill was dismissed by three barons, *contrà* Comyns, who was for directing to issue.

[Godfrey *v.* Littell.]

*Rolls*, Dec. 7.—The MASTER OF THE ROLLS. This is a bill filed for the purpose of having a commission issued to ascertain the boundaries of certain lands, which the plaintiffs assert belong to Queen's College, Cambridge, but are in the possession of the defendant. It appears that the lands in question, which are called Lacy Fields, have been from the time of Henry VIII. in lease to different persons under whom the defendant claims. These lands are known by the description of Lacy Fields, and contain by estimation about sixty acres. The last lease expired some years since, and on that occasion the defendant delivered up to Queen's College forty statute acres only. The defendant insists that a computed acre consists of three roods only, and that the lands so delivered up corresponded with the description in the lease, which stated that it contained sixty estimated acres; but it may be observed, that if the defendant was right in stating that by the custom of the county a computed acre contained three roods only, still he ought to have delivered up, according to that computation, forty-five instead of forty acres.

At the original hearing I was of opinion that the plaintiffs had established a title to some lands in the possession of the defendant, and not delivered up at the expiration of the lease, but it appeared upon the evidence that it was uncertain whether there were twelve acres not delivered up, or whether there were twenty acres, or what other quantity there might be, of which the defendant retained the possession. There was nothing to inform me as to the quantity. I requested, therefore, that the case might stand over, and that the precedents might be searched, in order that it might be seen what course the court had been in the habit of taking where it was convinced that there were some lands in the possession of the defendant, but the quantity was not established: and in consequence of that adjournment many cases have been referred to, from the result of which it appears that to establish a bill of this kind, it is, in the first place, essential that the plaintiff should make out a clear title to some lands in the possession of the defendant; otherwise this court will leave the plaintiff to his remedy at law. It was argued that the court will not interfere unless the title of the plaintiff to some lands in the possession of the defendant be admitted by the defendant, and certain cases were cited in which it appeared there had been an actual admission on the part of the defendant: but these cases do not prove that the court will not act unless there be an admission by the defendant; and undoubtedly, if a clear title be established by proof in the cause, it must be a sufficient inducement to the assistance of the court as if it had been admitted by the defendant. It would be quite absurd to say that the court would not act upon a title established by proof, but will act only on a title established by admission; for if that were the rule of the court, there never would have been a decree in cases of this nature, for no defendant would ever be advised to admit the title of the plaintiff; the consequence of which would be that the remedy would be wholly defeated. Of necessity, therefore, a title established by proof must be equally operative with a title established by admission. The authorities appear also to require it to be established that there is some equitable ground for its interference. And this is clearly stated in the case before Lord Northington, Wake *v.* Conyers, 1 Eden, 331, and in the case of Speer *v.* Crawter before Sir W. Grant.

[Godfrey *v.* Littell.]

In this case there appears to be a clear equitable ground for the interference of the court, namely, a confusion of boundaries, which it must be inferred was occasioned by the act of the defendant, or those under whom he claims. The defendant insists that the land which was comprised in the lease was bounded by a certain way called the Chaseway. The plaintiffs insist that there was land on both sides of the chaseway, and that the chaseway was not the boundary between the leased lands and the other property. Now it appears that a hedge has been made on the side of the chaseway, which appears to me not to be the boundary of the land of the plaintiffs; but that hedge has been made within the last fifty or sixty years, and there is no boundary to distinguish the land on the left of the chaseway from the property of the defendant. There is, therefore, as it seems to me, an equitable ground for the interference of this court. As this land has been in the possession of the defendant, and those under whom he claims, since the time of Henry VIII., this confusion of boundaries must be inferred to have been the act of the lessees; it can not have been the act of the lessors, for they were not in possession.

Under these circumstances, therefore, the plaintiffs have established the two principles which are essential to the jurisdiction of the court, namely; a clear title to some land in the possession of the defendant, and an equitable ground for the interference of the court. Such being the case, the authorities fully justify me in stating that, although the evidence of the plaintiffs be not uniform as to the quantity of land which they assert to be in the possession of the defendant, the court will still decree a commission not only to set out the land, but to inquire into the quantity of that land. The court has discretion either to order a commission or to direct an issue, but in this case the justice, due to the plaintiffs, will be best answered by a commission; for if an issue were directed, that issue might not determine all points in litigation. The quantity might be ascertained, but the actual local situation of the land might still remain in doubt, and a commission, therefore, might become necessary. My opinion, therefore, is, that in this case a commission must be issued to inquire and ascertain what lands of the plaintiffs are in the possession of the defendant, with the usual directions as to the production of deeds and the examination of witnesses.

The following is the substance of the decree which has been passed, but had not been entered when this went to the press:—

Decree commission to inquire and ascertain what lands comprised in the indenture of lease bearing date the 25th of February 1790, are now in the possession or occupation of the defendant, and to ascertain and set out the boundaries thereof; and in case the commissioners shall not be able to distinguish such lands, then they are to set out and allot other lands of equal value in the possession of the defendant in lieu thereof, or of such part as can not be distinguished. Deeds and papers to be produced by the parties on oath. Commissioners to be at liberty to examine witnesses on oath, and to take depositions in writing.

Further directions and costs reserved until after the return of the commissioners.

[Godfrey *v.* Littell.]

## NORRIS *v.* LE NEVE.

1742.—Reg. Lib. B. 1741, fol. 473.

The bill states, that part of the premises claimed by the heirs were copyhold and belonged to them, and their title thereto was not controverted, but that defendants insisted the copyhold lands were so intermixed with the freehold, and the boundaries so confounded, that they could not be distinguished by the plaintiff. Whereas the plaintiff insisted that the defendants could distinguish them, but, if necessary, prayed a commission. The defendants by their answer stated, that the freeholds and copyholds were intermixed, and the boundaries destroyed and could not be distinguished by them, and that in case the plaintiff should be adjudged entitled to the freeholds, they (defendants) were willing a commission should issue. The court decreed that the plaintiff was entitled to the freehold, and that the same should be distinguished and set out from the copyholds belonging to the defendants; and that a commission should issue to distinguish the freeholds by metes and bounds.

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## MILLARD *v.* PANCONST.

Aug. 7, 1794.—Reg. Lib. 1793, B. 505.

By order of this date it was ordered, that a commission should issue to inquire and ascertain what freeholds belonged to the testator at his decease, situate in Walton, and Wavendon Common, Berks, and what allotment in the inclosure of the common fields of Wavendon had been made or allotted to William Panconst deceased (testator's son) in respect thereof. The defendants prayed they might be allowed to join in the commission, which was ordered.

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## ROBINSON *v.* HODGSON.

17th December 1800.—Reg. Lib. B. fol. 125.—Master of the Rolls.

By the decree on further directions, dated 6th February 1797, it was referred to the Master to inquire what part of the testator's estates were customary, to which the plaintiff became entitled as customary heir. The plaintiff afterwards died, having previously been examined on interrogatories before the Master as to the customary premises claimed by him; and by his examination he claimed all the greatest part of the testator's estates remaining unsold as customary. That it being apprehended a small part only was customary, but the testator's freehold and customary premises having been for a length of time in possession of the same tenant, it was, by order dated 4th August 1800, ordered, that in case the Master should be of opinion he could not ascertain the cus-

tomary estates without a commission directed to commissioners to view and set out the same, he should be at liberty to state the same to the court. The Master, by his report, dated 16th December 1800, certified that a commission was necessary; and on 17th December 1800, it was ordered that a commission should issue to commissioners, authorizing them to view, ascertain, set out, and distinguish by metes and bounds, such parts of the customary estate of the testator to which the plaintiff was entitled as customary heir.

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## ATTORNEY-GENERAL *v.* BOWYER.

March 5, 1800.—Reg. Lib. A. 1799, fol. 408.

By an order of this date, made upon the motion of the relator, it was ordered, that a commission should issue directing commissioners to set out and distinguish the lands in the county of Suffolk claimed by defendant Sir George Bowyer, from the lands in the same county which passed by the will of the testator Sir George Downing, dated 20th December 1817. And in case the commissioners should not be able to ascertain and set out the boundaries of the land claimed by the defendant, they were to be at liberty to set out and allot to him other lands of equal value.

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## CLIFTON *v.* GWYNNE.

*Rolls*, Dec. 12, 1822.—Reg. Lib. A. 1822, fol. 2071.

The defendant, who derived his title from a grant *temp.* Hen. VIII. claimed to be entitled to the whole of the waste lands in certain parishes, as belonging to certain manors of which he was lord. The plaintiff claimed to be entitled to a part of those waste lands, as pertaining to the manor of Welch Penkely, which had anciently been held with the defendant's manors, and the defendant himself had been steward under the crown of this manor; the plaintiff had become owner by purchase of the crown, but was unable to ascertain to what part of such waste lands his title as lord extended; and the defendant denied his right to any. By the decree of this date it was ordered, that a commission should issue to inquire whether the defendant, or any person claiming under him, was in possession of any lands of right belonging, or which did at the time the defendant became steward of the manor, of right belong, to the manor of Welch Penkely; and that the commissioners should, as far as they were able, set forth and describe such lands "if any such there be." And in that case set out and distinguish by metes and bounds such parts, if any, of the lands belonging to that manor in the possession of the defendant, or those claiming under him, lying intermixed with lands belonging to the defendant's manors; and set out so much of the respective lands so intermixed, as to the commissioners should seem a fit and fair equivalent for the plaintiff's portion thereof.

## Knight and another *v.* Martin.

1 *Tamlyn*, 237.

The Master of the Rolls, in a suit by the assignees of a bankrupt against a trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favour of the plaintiffs, would not make the trustee pay costs, he having acted in ignorance.

*Rolls*, Dec. 8, 1829.

A TESTATOR had bequeathed the sum of 2000*l.* to his executor upon trust to pay the interest to his sister for life, and after her death to divide the principal sum amongst the children of his sister who should be living at the time of her decease as they should respectively attain the age of twenty-one years. There were three children, and the sister having died in 1826, the executor paid to two of them their shares: the other became bankrupt in 1821. The plaintiffs are his assignees, and filed their bill against the executor, alleging that he had refused payment, and praying that the same with interest might be paid to the plaintiff. The defendant, by his answer, said he was willing to pay upon the joint receipt of the bankrupt and his assignees, and that he had been at all times willing to pay to the plaintiffs if he could do so with safety; but that the bankrupt, who had obtained his certificate, had given him notice not to pay over the same to the plaintiffs, and had claimed the same himself, and had threatened to institute proceedings against the defendant to make him personally liable for the said fund. Defendant submitted whether the bankrupt was not a necessary party, and to act as the court should direct. The defendant had examined a witness to prove letters to him from the bankrupt, claiming the property.

Mr Bickersteth and Mr Booth for the plaintiffs.
Mr Pemberton for the defendant.

The MASTER OF THE ROLLS made a decree for payment of the sum claimed, and he directed that the defendant should pay the costs; but on coming into court on the next day he sat, Friday the 11th of December 1829, his Honour, calling the attention of counsel to this case, said, that he thought he ought not to make the trustee pay costs, that trustee having acted in ignorance; but he could not give him his costs.

## Bennett *v.* Low.

1 *Tamlyn*, 238.

IN this case a bankrupt had been made a party defendant in a suit after his bankruptcy. He set up a claim on his answer to a life interest

under the settlement on his marriage, yet it being manifest that he had no interest, all his estate having passed to the assignee under the commission against him, and who was before the court, the Master of the Rolls dismissed the bill as against the bankrupt with costs.

**Between his Majesty's Attorney General, at the relation of John Langhorn and John Clay, inhabitants and householders of the parish and borough of Berwick-upon-Tweed, informants; and the Mayor, Bailiffs, and Burgesses of the borough of Berwick-upon-Tweed, and Mark Jameson their Town Clerk, defendants.**

1 *Tamlyn*, 239.

The mayor, bailiffs, and burgesses of Berwick-upon-Tweed, in consideration of 50*l.* left by will for the erecting and maintaining of a house of correction there, by feoffment dated 28th May 1653, conveyed the moiety of a property there to the church-wardens and overseers for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c. conveyed the other moiety, and some other lands, for the like purposes:

Held, that this town never having at this time raised poor rates under the statute of Elizabeth, these were gifts in aid of the poor rates.

As to a part of the land, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate chest. The court being satisfied upon the evidence it was intended to be comprised in the second feoffment, the court declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses. The extra costs of the relators to come out of the fund.

*Rolls*, December 8, 1829.

BY an indenture of feoffment, dated the 28th day of May 1653, between the mayor, bailiffs, and burgesses of the borough of Berwick-upon-Tweed, of the one part, and Andrew Crispe, alderman, of the other part, with livery of seisin indorsed, reciting that Sir Robert Jackson, knight, deceased, by his will bequeathed the sum of 50*l.* towards the erecting and maintaining of a house of correction within the borough of Berwick-upon-Tweed. It was witnessed that in consideration thereof, they the said mayor, bailiffs, and burgesses, did grant, bargain, sell, alien, enfeoff, and confirm unto the said Andrew Crispe, and his assigns, all that the moiety or full half part of that water corn milne, with the appurtenances, situate and being within the bounds, liberties, and precincts of the borough of Berwick aforesaid, called Graingborne Milne,

[Attorney General *v.* Corporation of Berwick-upon-Tweed.]

together with all grounds, lands, arable and unarable, meadows, pastures, commons, hereditaments, and appurtenances to the same belonging; to hold unto the said Andrew Crispe and his assigns during his life, and after his decease, to such persons as Mr Mayor and the general guild of the said town should think fit and appoint from time to time, to and for the erecting, upholding, maintaining, ordering, providing, and disposing of a house of correction within the borough of Berwick aforesaid, and for the better maintaining, ordering, providing for, and disposing of the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting of them and every of them to work.

By an indenture of feoffment, bearing date the same 28th day of May 1653, between the said mayor, bailiffs, and burgesses, of the one part, and Robert Trumble and others, churchwardens, Thomas Dickinson and others, overseers of the poor within the borough of Berwick aforesaid, of the other part, with livery of seisin. It was witnessed that in consideration of the sum of 350*l.* by them owing to the poor of the parish of the borough of Berwick aforesaid, they the said mayor, bailiffs, and burgesses did give, grant, bargain, sell, alien, enfeoff, and confirm unto the said Robert Trumble, and the other persons, parties of the other part, the other moiety or full half part of the said milne, together with several pieces of ground situate within the bounds, liberties, and precincts, of the said borough of Berwick, commonly called and known by the several names of the Clay Walls and Burrs, alias Aller Bush, to hold to the said Robert Trumble, Nicholas Lowe, &c., and their successors, to the same uses, intents, and purposes, as are expressed in the said indenture of feoffment, of even date.

The information stated the preceding facts, and that during many years the rents and profits of all the premises comprised in the two indentures were received by or paid over to the churchwardens and overseers for the time being of the said parish and borough, and by them applied either wholly in and towards the maintenance and employment of poor persons in a house used as and for a workhouse or house of correction, or partly for the above purposes, and partly for the use of the poor within the said borough.

That no further feoffment had been made.

That the rents had from time to time by the authority of the corporation been received by their treasurer. And as to the rents of Grainsburn Mill, and a close or parcel of land adjacent thereto, containing about twenty-five acres, the same had been, ever since the decease of the trustees in the indentures named, (except the interruption hereinafter referred to) either received by the treasurer of the corporation, and by him, by and under the authority of the corporation, paid over to the overseers for the time being of the said borough and parish, to be by them applied pursuant to the trusts, or, under the like authority, by the permission of the treasurer had been received by the overseers of the poor from the tenants, and applied as before mentioned. And that in the years 1820 and 1821, the rents were under the like authority retained by the said treasurer for a very considerable time, although frequently applied for by or on the behalf of the then overseers of the poor. And on or about the 26th of September 1823, at a guild or meeting of the said corporation, it was resolved that the treasurer should retain the

same rents for the use of the corporation; and such rents were during six months retained, and the same were afterwards paid over to the overseers, although it was alleged by the corporation that the rents ought to be employed in providing a house of correction for the keeping, correcting, and setting to work, rogues, vagabonds, sturdy beggars, and other idle and disorderly persons, within the intent of an act of parliament, passed in the seventh year of King James the First, intituled "An act for the due execution of divers laws and statutes heretofore made against rogues, vagabonds, and sturdy beggars, and other lewd and idle persons."

That for a long series of years, and above 100 years last past, no part of the rents and profits of the said lands in the second indenture described as the several pieces of ground situate within the bounds and liberties of the borough of Berwick, called and known by the several names of the Clay Walls and Burrs, alias Aller Bush, or of any part of the said charity estate, except the said mill and the close held therewith, had been paid over to the said overseers, or applied to the purposes of the said charitable trusts, or for the use of the poor.

That the said mayor, bailiffs, and burgesses, had in part fraudulently changed the names and altered the boundaries of the said lands, and confounded or endeavoured to confound the same with other lands belonging to them in their corporate capacity; particularly as to a close called the Burrs, which the bill stated to belong to the charity, and to have been comprehended in the second feoffment.

The information asked for a discovery as well against the corporation as against Mark Jameson the town clerk, and prayed that it might be declared that the two indentures of the 28th of May 1653, were effectual conveyances at law or in equity of the lands and hereditaments therein comprised, and the fee-simple thereof upon and for the charitable trusts and purposes thereby declared, and that the said charity might be established; and that the boundaries thereof might be ascertained; and if they were confounded, lands of a competent value belonging to the corporation might be set out; and for an account.

The defendants by their answer set forth the following order of guild, bearing date the 2d day of May 1653: (*i. e.*) "Ordered that there shall be security given Mr Crispe to and for the use of the *poore* of this parish, by way of conveyance or rent-charge out of the Grainsburn Milne, for security for the 50*l.* promised by Sir Robert Jackson towards the erecting a house within this boro'; the further consideration whereof is referred to the next general gill." Also another memorandum or order of guild bearing date the 13th day of May 1653: "It is this day ordered that there shall be a conveyance made to Mr Crispe during his life in trust, for the erecting a house of correction with this borough, of the moiety of Grainsburne Milne, in consideration of 50*l.* left by Sir R. Jackson for that use, and now by him paid; and that there be another made to the churchwardens and overseers of the poor of the other moiety thereof for the same use." And the defendants further said, that they found the enrolments of the two indentures of feoffment in the enrolment book of the corporation, and they found in the record-room the two indentures of feoffment cancelled, and that if those indentures were redeemable, they had been redeemed by moneys paid by the corporation for erecting and repairing the house

of correction, and for the use and benefit of the poor. They admitted the order of the 14th November 1821 to their treasurer to retain the rents, but they set forth another order of guild bearing date the 21st day of February 1822, whereby it was ordered that the rents of the Graingburn Mill should be paid by the treasurer to the overseers, and the treasurer paid the same accordingly; but by a subsequent order, the treasurer was directed to retain the rents, which he did for five months, when he was again ordered to pay the rents to the churchwardens and overseers.

By an order of guild, 2d May 1653, the security (as it is called) to be given to Mr Crispe for Sir Robert Jackson's 50*l.*, is stated to be "to and for the use of the poor of this parish."

By the orders of guild, 28th January 1656, the repair of Graingburn Miln is said "*to concern the poor, it being for their use.*"

By an order of 19th May 1676, A. Crispe is declared to be a feoffee "for the use of the poor." By an order, 10th February 1676, the rent of the milne is said to belong to the poor.

In an order 10th November 1682, similar expressions are used; and by an order 18th January 1688, "the poor" are declared to be "in great straits by reason of the nonpayment of the rents of Graingburn Mill to the poor;" and by an order of 17th November 1721, "the heirs of the trustees" are ordered "to attend the guild to be discoursed with as to the letting of the miln for the greatest advantage of the poor."

Documentary evidence, and the depositions of witnesses, were given in evidence with respect to the identity of the Burrs, which will be seen to be fully noticed in the judgment.

Mr Tinney and Mr Rolfe, for the relators.

Mr Bickersteth and Mr Kindersley, for the defendants, the mayor, bailiffs, and burgesses.

The Master of the Rolls. This is an information filed by the Attorney-General, at the relation of certain inhabitants of the town of Berwick-upon-Tweed; the defendants are the corporation of that town. (His Honour then stated the prayer of the bill, and the two indentures of the 28th May 1653.) The second conveyance is stated to be a conveyance made in consideration of 350*l.* due to the poor. Now it is extremely important, first, to know what is meant by the 350*l.* due to the poor. It appears, however, by entries, that at this time the town of Berwick-upon-Tweed had not taken the benefit of the statute of Elizabeth, and had not raised rates under that statute for the relief of the poor. The poor, therefore, could have acquired property only by the donations of benevolent persons, and it must be intended that this 350*l.* due to the poor, was a sum of 350*l.* which like the 50*l.* given to the use of the poor by Sir Robert Jackson, had arisen from the donations of certain benevolent persons. Now, the second conveyance, like the first, would not create the legal fee; the churchwardens and overseers not being a corporation, could not take the legal fee, because it was limited to them and their successors for ever; if they had been a corporation they would have taken the legal fee. So the other conveyance, which was a conveyance to Crispe for life, with remainder to

such persons as the corporation should from time to time appoint for ever, could not confer the legal fee. A legal fee can not be created in individuals without the use of the word "*heirs*," or some expression which is equivalent to the effect of the term "*heirs*." With respect to charitable trusts, the court does not adhere to form; the court always looks at the intention and the intention here was plainly to constitute a charity which was to endure for ever. It appears by one memorandum only in the guild book, that it is stated that these conveyances were a security to the poor; and it has been said at the bar, that the security to the poor must mean a redeemable security, and therefore, that the corporation might resume these lands at any time by showing that the consideration in respect of which the conveyances were made by way of security, had been satisfied to the use of the poor. Now I do not apprehend that security to the poor has at all the meaning which is contended for here, because it was in truth a security to the poor if it were meant to be a perpetual conveyance, for it secured to the poor the revenues of those lands, in the place of leaving the moneys given to the use of the poor in the coffers of the corporation, which might be dissipated and lost; and in that sense it appears to me the term "security" is used in that memorandum. I am of opinion, therefore, that this court must decree that the trusts of these two conveyances are to be established as trusts for charitable purposes. The next question is as to what charitable purposes are those trusts to be established. Generally speaking, gifts for the use of the poor are not gifts in aid of the poor-rates; because it has been said, in other cases, that gifts in aid of the poor-rates would be gifts for the benefit of the rich and not for the poor; but in this particular case, this town not having taken the benefit of the statute of Elizabeth, and never at this time having raised poor-rates, these were gifts for purposes in respect of which poor-rates were to be levied under that statute; these gifts, therefore, were a substitution for poor-rates; poor-rates having been adopted in that town in the year 1729, the declaration of the court must be, that these were gifts in aid of the poor rates. It appears so far from the corporation considering these conveyances merely to amount to redeemable securities, that they have continued to apply the revenues of the lands which they insisted were comprised alone in these two conveyances in aid of the poor-rates, down to the present time. The lands of which they have thus applied the revenues consist of twenty-five acres; and the question is, whether those twenty-five acres are or are not the whole lands comprised in those two conveyances? For the corporation it is said, that those twenty-five acres comprise all the lands, and they reason thus: the lands comprised in the two conveyances are Graingburn Mill, with the lands belonging to it, Clay Wall Lands, and the lands called the Burrs, or Aller Bush. That it appears by a certain entry in the guild books in the year 1620, that the Graingburn Mill was at that time erected by the corporation, and that there was then annexed to it three acres of land only; that it appears on the evidence that the Clay Wall Lands consisted of five acres only, making together with the three acres of land of the Graingburn Mill, eight acres; and the revenues of twenty-five acres having been constantly applied to the use of the charity, that it must be intended that the seventeen acres to make up the twenty-five, were the

lands described under the term Burrs, alias Aller Bush. Now this would be a most reasonable conjecture provided there was no evidence in the cause; but there is evidence on both sides, and the evidence on both sides must be opposed in order to determine on which side the weight of evidence applies. [His honour here went into a very elaborate and critical review of the evidence, in the course of which he showed instances of the application of the rent of the Burrs down nearly to the eighteenth century, when the application of any part of these rents of the Burrs ceased for the use of the poor and was wholly carried to the corporate chest, and that when the corporation afterwards applied a part of the rent which they received for the Burr Lands to their own use and for the benefit of the corporation chest, it was to be considered as a gradual usurpation, which at last terminated in the application of the whole of those revenues to that purpose.] Under these circumstances, therefore, I must infer that the lands called the Burrs were not included in the twenty-five acres, but that between the year 1620 when the Graingburn Mill was erected, and the year 1653, when these conveyances were made, there had been by the acts of the corporation considerable additions made to the quantity of land which was originally annexed to the Graingburn Mill; and that the land called the Burrs, therefore, which is stated to be about nine or ten acres in quantity, and the description of which is perfectly known, and is now in the occupation of a person of the name of Laing, was land meant to be comprised in the second feoffment, in addition to the Clay Wall Lands. The amount of the consideration which is there stated to have been 350*l.*, was a sum at that time of very considerable value compared to the present nominal value of that sum.

Upon the whole, therefore, I must declare that the Graingburn Mill, with the twenty-five acres of land, together with the land called the Burrs, now let to Laing, were by the indentures of the 28th of May 1653, devoted for ever to the erecting and upholding a house for the reception of the poor of the said town, and for the maintenance of the poor therein; and that the same, being purposes which were by law to be provided for out of the poor-rates, the rents of the said mill and lands are applicable in aid of the poor-rates, and are to be paid by the defendants to the churchwardens and overseers of the poor accordingly; and I must refer it to the Master to take an account of the rents which have accrued due from the said lands called the Burrs since the year 1823, when the same was claimed for the use of the poor; and I must also refer it to the Master to tax the costs of the relators up to the hearing, and direct that the same shall be paid by the defendants, and reserve further directions and subsequent costs.

The costs to be taxed costs as against the defendants, and the relators to be paid their extra costs out of the funds.

The Master to ascertain what lands occupied by Laing consist of the Burrs, and to apportion the rents.

There was a question as to the costs of the town clerk, who had been made a party to the bill for the purpose of discovery. Ordinarily the plaintiff pays the costs of a bill of discovery; in this case the officer of the corporation was made a defendant for the purpose of discovery, and the court seemed to think that the corporation must pay his costs, and the Master of the Rolls directed that an inquiry should be made as to

the practice, and whether, if the relators in this case are to pay the town clerk's costs, the corporation must repay them to the relators. The precedents were to be searched.

The question of costs has not yet been decided.

## Fereday and others *v.* Wightwick and others.

1 *Tamlyn*, 250.

Mines are, for many purposes, partnership property. They are liable to the debts of the partnership and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share repayment is to be made to the co-partnership of what is due to it from him.

Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious.

*Westminster Hall*, Nov. 19, 1829.

BY indenture of lease, dated the 24th of June 1799, George Birch, Esq. and Thomas Lane, clerk, granted and demised unto Thomas Smith, Samuel Fereday, William Turton, Charles Norton, Thomas Jones, and William Underhill, all the mines and strata of coal under certain messuages and lands at Tipton, in Staffordshire, for the term of 120 years, at the annual rent of 300*l.* an acre; and by an indenture of the same date, a lease was granted of the messuages and lands to the same lessees, except Underhill, for the like term of 120 years. By a deed, dated 5th August 1800, the shares of each in the colliery were declared to consist in the whole of 200 shares, of which twenty-nine belonged to Underhill, and twenty-eight to Turton. By indenture bearing date the 19th May 1802, in consideration of 6500*l.*, Underhill assigned his twenty-nine shares to his copartners, and the consideration-money was paid out of the partnership fund. Various changes took place in the ownership of the shares, and Samuel Wagstaff became entitled to twenty-eight of them. Turton, who had the management of the partnership, became considerably indebted to it, and deposited with the plaintiffs some promissory notes as a part security. On the 2d March 1822, a commission of bankrupt was issued against Turton, and on the 20th January, 1823, a commission was issued against Wagstaff. On the 4th March 1822, Turton being then a bankrupt, the other parties signed a dissolution, which was advertised in the London Gazette. The bill stated the preceding facts, and that the copartners had a lien upon the twenty-eight shares of Turton for the balance due from him to the copartnership, and charged that on the 28th February 1822, a notice was served upon the copartnership that by a certain indenture bearing date the 18th day of January 1813, William Turton assigned eight shares in the colliery and premises to Benjamin Higgs, for securing 3000*l.* and lawful interest. On the 2d March 1822, a notice was served upon the copartnership, that by an indenture bearing date the 26th February

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1814, Turton assigned to Thomas Devey Wightwick, a defendant, twenty shares as a security for certain sums of money. And the plaintiffs charged that such notices conveyed to them the first knowledge they had of the assignments therein respectively mentioned. And plaintiffs charged that those mortgages or securities were usurious and void. And, as evidence thereof, the plaintiffs charged, that by the indenture of the 28th February, 1814, William Turton, in consideration of 4000*l.* therein stated to be paid to him by Thomas Devey Wightwick, granted to him (Wightwick) an annuity of 731*l.* 8*s.*, payable half-yearly, for an absolute term of *eleven years and six months*, and he assigned the aforesaid twenty shares in the colliery as a security for such annuity. And the plaintiffs further charged that the same annuity paid half-yearly for eleven years and six months was more than sufficient to secure and pay at the end of that period the principal sum of 4000*l.*, with interest for the same in the meantime, at the rate of 15*l.* for every 100*l.* thereof by the year, without any loss or risk whatever either of capital or interest. And the plaintiff further charged that such annuity paid half-yearly for *six* years and *six* months was more than sufficient to secure or pay at the end of that period the principal sum of 4000*l.*, with interest for the same at the rate of 5*l.* for every 100*l.* thereof by the year. And the plaintiffs further charged that at the time when the defendant Wightwick advanced the 4000*l.* to Turton, the real agreement between them was, that Turton should secure to Wightwick an annuity of 664*l.* 18*s.*, free from the property tax, for the term of eleven years and six months; and pursuant to such agreement, Turton immediately before the execution of the alleged deed, made and signed twenty-three several promissory notes for 332*l.* 9*s.* each, being one moiety of the 664*l.* 18*s.*, payable, the one on the 26th day of August then next ensuing, and the others successively on the several days during the said period of eleven years and six months on which the several half-yearly payments of the annuity were to be made payable; and that Turton deposited the notes with Wightwick by way of further securing the alleged annuity. And it was agreed between them that on each of the half-yearly days of payment of the annuity, Turton should take up one of the notes in discharge of the then accruing half-yearly payment of the annuity. And the plaintiffs further charged, that it was at the same time agreed between Turton and Wightwick that a sum of 66*l.* 10*s.*, being one tenth part of the 664*l.* 18*s.*, or thereabouts, should be added to the 664*l.* 18*s.*, and that the sum of 731*l.* 18*s.*, being the amount of the two sums added together, should be the amount of the alleged annuity so to be granted and secured. Further charged, that the 66*l.* 10*s.* was added to meet the property tax on the annuity. Further charged, that fourteen of the notes or bills had been duly taken up and paid by Turton previously to his bankruptcy, and that the remaining nine still remained in the possession, custody, or power of Wightwick. Further charged, that at the respective times of the loans or advances by Turton to Higgs, it was agreed that Turton should pay to Higgs interest at the rate of 10 per cent., and that interest was paid at that rate. Further charged, that Higgs entered, and had in his books of account a debtor and creditor account between himself and Turton, in which he regularly took credit on the several quarterly days of payment from Lady-day 1809 to Midsummer 1815 inclusive, for one quarter's

interest, after the rate of 10 per cent. Further charged, that no notice was ever given by Higgs to the company that the interest on the alleged mortgage debt, or any part thereof, was in any manner in arrear or unpaid. Further charged that neither Wightwick nor Higgs gave notice to the firm that they desired to be considered as partners in respect of the assignments or otherwise, or that the firm was not to consider Turton as a partner; but, on the contrary, Wightwick and Higgs permitted and suffered Turton to appear and act, and the plaintiffs fully believed him to be the owner of the twenty-eight shares to all intents and purposes.

And the bill prayed that it might be declared that the copartnership was dissolved on the 2d day of March 1822, and that the said copartnership might be declared to have a lien upon the twenty-eight shares of Turton for payment of what was due from him to the copartnership.

Defendant Wightwick, by his answer, set forth his annuity-deed, whereby, for 4000*l.*, an annuity of 731*l.* 8*s.* was granted to him, and insisted upon its priority to any balance which should be found to be due from Turton to the copartnership. He said, that the assignment to him was known to several of the copartners, and denied that the notice of the 2d March 1822 was the first notice that the copartnership had of the assignment to him, and the defendant said that he had paid a valuable consideration for the annuity, to wit, 4000*l.* This defendant further admitted that Turton did, on the 26th February 1814, make and sign three several promissory notes for 332*l.* 9*s.* each; and that the sum for which such notes were respectively signed, was one moiety of the said annuity of 664*l.* 18*s.*: admitted the payment of the annuity for seven years up to 26th February 1821, but said that he never contracted to lend Turton 4000*l.* or any other sum.

Defendant Higgs, by his answer, insisted upon the priority of the indenture of assignment of the 18th January 1818, and claimed it in priority to any balance claimed by the copartnership, and admitted it was understood that Turton should pay him 10*l.* for every 100*l.* by the year, and that this defendant regularly took credit in his books for interest at that rate. Amongst the depositions on the part of the plaintiffs was that of an accountant, that he had made a calculation of the value of an annuity of 731*l.* 8*s.* payable half yearly for the absolute term of eleven years and six months, and according to that calculation, he found that such an annuity so payable would be sufficient to pay within that period the sum of 4000*l.* with interest thereon at the rate of 14 per cent. per annum, and that the like annuity of 731*l.* 8*s.* payable half yearly, would be sufficient to pay in six years and six months the sum of 4000*l.* and interest at 5 per cent. per annum. And he also found that an annuity of 664*l.* 18*s.* payable half yearly for an absolute term of eleven years and six months without any deduction, would be sufficient to pay in that period the sum of 4000*l.* and interest, at the rate of 12*l.* 10*s.* per cent. per annum. There were other depositions to the same effect, one of which stated, that the interest produced would be 12 per cent., and the time for repayment at 5 per cent. seven years and a quarter. There were also depositions of the debt due from Turton to the company. On the part of the defendant Wightwick there was the evidence of the bankrupt, that three of the shareholders knew of the annuity granted to him. In the cross-examination he proved, that the real understanding between

him and Wightwick was, that he should advance him 4000*l.* and that in some manner the same should be secured to him with interest exceeding 5 per cent. And he also proved the charges in the bill with respect to the notes.

Mr Bickersteth and Mr Rolfe for the plaintiffs.

Mr Bickersteth. It appears that in July 1813, Higgs had made advances amounting to 3000*l.* to Turton, upon an agreement that he should receive 10 per cent., and Higgs in answer admits this, and that he had credit for it in his account with Turton. Higgs took an assignment of eight of Turton's shares in the colliery in the shape of a mortgage, purporting to secure the sum of 3000*l.* with lawful interest: yet after the execution of that deed, as well as before, he received 10 per. cent. interest.

With regard to the case of Wightwick, he had at different times advanced 4000*l.* to Turton; the transaction on the face of it is a purchase of an annuity of 731*l.* 18*s.*, payable for eleven years and six months for 4000*l.* We find that in the course of eleven years and a half, he would have received back his principal with interest at 12 per cent.; in seven years and a quarter, he would have received his principal with interest at 5 per cent. Wightwick has actually received these payments for seven years; this is an usurious transaction, and a contrivance to get back the principal money with interest at 12 per cent. Now I am not prepared to say in all cases that a purchase of an annual sum would be usurious; but in this case there is no hazard. At the time of the bankruptcy of Turton, he was indebted to the partnership in the sum of 10,000*l.* and upwards, and no person can take any thing from Turton's interest until the partnership claim is satisfied: those who stand in the place of the partner, can not be better situated than the partner himself had he not become bankrupt. The affairs of a colliery has from the time of Lord Hardwicke been considered as a trading partnership, Crawshay *v.* Maule, 1 Swanst. 495; as against the assignees of Turton, the other partners are entitled to a lien on his shares for the purpose of satisfying the claims of the partnership upon his estate. I can not dispute that those who represent Turton are entitled to a share of the subsequent profits of the co-partnership, the property of the bankrupt having been employed in it, Crawshay *v.* Collins, 15 Ves. 218.. Waters *v.* Taylor, 15 Ves. 10. Forman *v.* Homfrey, 2 Ves. & Bea. 329. Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

Mr Rolfe. The question is, have the assignees of Turton, or the defendants Higgs and Wightwick, any claim upon the mines, except as to what shall remain after the demands of the co-partnership are satisfied? In Crawshay *v.* Maule, Lord Eldon held that the leases constituted a part of the partnership effects. Now there were only in that case two individuals in the partnership, and if there could have been a case in which each partner might have disposed of his share that was the case; but Lord Eldon said that it had been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade are no more than stock in trade, and, as a part of the stock, might be sold. In Jefferys *v.* Smith, 1 Jac. & Walk. 298; Lord Eldon, referring to a case before Lord Hardwicke, said that a colliery was

to be considered in the nature of a trade* and where persons had different interests in it, it was to be regarded as a partnership; and where persons were concerned in such an interest in the lands as a mining concern, the court would appoint a receiver although they were tenants in common of it. Now in the case before the court, the parties held under leases, and the part afterwards purchased was paid for out of the funds of the partnership. Now do not the twenty-nine shares so purchased, form part of the partnership? The mine being worked under a common firm by the direction of a manager, and carrying every appearance of a partnership. The plaintiffs have a lien against the asssignees, and against the persons claiming under the deeds of Turton. Neither Wightwick nor Higgs can establish any claim under the deeds of Turton which are usurious; for defendant Higgs in his answer admits that the security was for the money at 10 per cent. If that be not usury, it would be impossible to say what is usury. With respect to Wightwick, it will be contended that an annuity for years certain does not constitute usury, but the authorities refer only to rent charges, and those, if not colourable, would be good if they were not in reality interest of money. This is an annuity secured by an express covenant of the grantor, that half yearly the party should receive a sum which in the end would exceed the principal and interest at 5 per cent. Could a man for 100*l.* grant an annuity of 110*l.* for one year? Could that be supported—or an annuity of the like sum for two years in consideration of 200*l.*? In the case of the Defendant Higgs, there is a clear admission; and with respect to Wightwick, if there be not a case against him, certainly the laws against usury are not so strong as they have been thought to be.

Mr Lovat, for the executor of a deceased partner, and in the same interest with the plaintiff. In Doe *v.* Gooch, 3 B. & A. 666, where the court having found that it was a usurious loan, refused to disturb the verdict on a motion for a new trial; upon which justice Bayley said, the annuity is at hazard if for life; but where it is in the nature of an annuity for years, there is no case in which such an annuity has been held not to be usurious, where upon calculation it appeared that more than the principal, together with legal interest, was to be received.

Mr Tinney for the assignees of Turton. If Mr Turton at the time of his bankruptcy had drawn out 10,000*l.*, I admit that in the account up to that time the partnership may take credit; but subsequent profits can not be placed to that credit. There is an old case of Story *v.* Lord Windsor, 2 Atk. 630, wherein Lord Hardwicke said a colliery is a kind of trade, and therefore an account might be taken of the profits in this court; but a debt of one partner upon another can not effect his share. If the court should be of opinion that this was a copartnership, the copartners would only be entitled up to the time of the bankruptcy.

(His honour dissented from this, and was of opinion that the accounts must be taken up to the time of the sale.)

* Story *v.* Ld. Windsor, Atk. 630. Sayer *v.* Pierse, 1 Ves. 232.

[Fereday *v.* Wightwick.]

Mr Pemberton and Mr Wilson for the defendant Wightwick. The securities to Wightwick can not be impeached at the instance of the present plaintiffs unless they first establish that they have some interest in the shares of Turton. But they have shown no such interest. Turton and the rest of the owners of these mines were mere tenants in common. It was not a trading partnership, nor can the doctrine of lien, which exists as between partners in a trade, be applied to an interest of this nature. It was a tenancy in common in lands and in taking the produce of them. That produce underwent no alteration, but was brought to market in the same condition in which it was obtained from the mines. In this respect the present case differs entirely from the case of Crawshay *v.* Maule, which is cited for the plaintiffs. The property there was iron-works, in the carrying on of which not only the iron ore obtained from the mines was made use of, but there was evidence that the partners, in the course of their trade, purchased large quantities of iron from other persons, and that the ore obtained from their own mines and the iron thus purchased were manufactured by them and taken to market, and sold in a manufactured state. That was clearly a trading partnership. Here, however, the subject is coals, which are merely taken from the mine and sold, without undergoing any change whatever. The parties merely took the natural produce of the land, and it does not differ from the ordinary case of tenants in common of lands, where one of the tenants in common has received more than his share of the rents and profits: in which case his companions have a personal remedy against him, but have no lien on his share. The evidence discloses another ground on which a court of equity ought to refuse relief to these plaintiffs. It appears that they were apprized of the treaty with Wightwick; that the negotiation with him was conducted by one of them; and that the money advanced by Wightwick was received by some of them in satisfaction of a debt previously owing to them by Turton.

Supposing, however, the opinion of the court to be against the defendant Wightwick on both these points, it is submitted that no case has established the proposition that this transaction is usurious; but, on the contrary, there are many cases to show that it is not so. Usury is an offence created entirely by statute, and nothing can be usurious except what the statutes have expressly declared to be so. The present law on the subject of usury is the statute 12 Ann. c. 16., which provides, "that no person shall for loan of any moneys, wares, merchandize, or other commodities whatever, receive above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever made after the time aforesaid for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void."

It is obvious, therefore, that where there is no loan, or no forbearance, there can be no usury; and in conformity with this rule, it has been repeatedly decided that where the transaction is really for a sale of an annuity, though for a term certain, if there was neither a loan nor a communication for a loan, the grant is not usurious, though, in the

event, the party may receive a larger sum than the legal rate of interest would have amounted to. And they referred to Finch's case, And. 121 pl. 169, Fuller's case, 4 Leon, 208. pl. 334, Burton's case, 5 Co. 69, Rowe *v.* Bellasis, Sid. 182, in which last case on the loan of 100*l.* it was agreed that for the forbearance the borrower should pay 120*l.* as follows; viz. 40*l.* on the 20th January and 20th July, by equal portions annually, next after July then instant, which exceeded the then legal interest of 6 per cent.; and for further security a bond was given and judgment confessed for 200*l.* Twisden J. held that the contract was not usurious, but was a purchase of an annuity for three years. They also referred to the opinion of Burnet J. in Lord Chesterfield *v.* Janssen, 2 Ves. 142, and that of De Grey C. J. in Murray *v.* Harding, 2 Bl. Rep. 859. The observation of Baley J., cited on the other side from Doe *v.* Gooch, was evidently made by that learned judge when his attention had not been called to the existing authorities on the subject and can not be considered as an expression of his opinion on the point.

The Master of the Rolls. In the year 1799, a lease was taken of certain mines, and a lease was also taken of the surface; the mines and surface were used with a community of expense and profit. A mining concern is to some purposes a trading concern; it is not so to all purposes; it has not therefore all the incidents of a trading concern. It is a principle that all property, whether real or personal, is subject to a sale on a dissolution of the partnership. This is a property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership.

Then as to the loans, are they not usurious? The persons who advanced them have obtained the legal interest. The first person who claims is Higgs, who at different times advanced 3000*l.*; and it was agreed that he should receive 10 per cent., and he actually did receive 10 per cent. up to the time of the execution of the mortgage security to him. Subsequently a mortgage is made to him to secure that sum with interest at 5 per cent.; but it appears by the evidence that he continued to receive 10 per cent. It is impossible to raise a question upon it. This is clearly usurious. The other defendant's claim it has been endeavoured to support by serious argument. He purchased an annuity of 664*l.* 10*s.*, and the property tax is added; this was purchased by him for the term of eleven years and a half, and there is a covenant in the deed to pay the same by half yearly payments. The transaction was accompanied by notes, which were respectively to the amount of a half year's annuity. It is mere colour that this is the purchase of an annuity. Several old cases have been referred to, which, however, I do not think it necessary to consider. What in substance is this transaction? Is it not in effect a loan? These promissory notes are for payment by instalments. This transaction is substantially a loan of money to be repaid by instalments exceeding the principal, and 5 per cent. interest.

It is in my opinion usurious.

His Honour then made the necessary declarations.

[Fereday *v.* Wightwick.]

By the minutes of the decree, it is referred to the Master to inquire and certify who were at the time of the bankruptcy of the defendant William Turton, and who have from time to time since been, and who now are the persons entitled to and interested in the partnership concern in the pleadings mentioned, and in what shares and proportions they were and are respectively so entitled and interested. And declare that the two several leases of the mines and minerals, and of the surface of the land under which the same are situate in the pleadings mentioned, both dated the 24th June 1799, and the property comprised therein constitute part of the property of the partnership; and let *the twenty-eight shares, late of the defendant William Turton, in** all and singular the partnership property and effects be sold, with the approbation of the Master, to the best purchasers that can be got for the same, to be allowed of by the Master, wherein all proper parties are to join as the Master shall direct; and let the money arising from the sale be paid into the bank, with the privity of the Accountant-General of this court, to the credit of this cause, subject to the further order of the court; and refer it to the Master to take an account of the dealings and transactions of the partnership from the last settled account before the bankruptcy of the defendant William Turton, up to the time of the sale hereinbefore directed, not disturbing any settled account; and let the Master inquire and state what debts are due and owing from the partnership, and let such debts be in the first place satisfied out of the proceeds of the sale, but without prejudice to any question between any of the parties; and declare that the plaintiffs are entitled to be repaid out of what shall appear on taking the accounts to be coming to the defendants, the assignees of the defendant William Turton, in respect of his twenty-eight shares of the said concern, whatsoever sum shall be found to be due to the said concern from the defendant William Turton, or his assignees, at the time of the aforesaid sale; and declare that the indentures of the 18th January 1813, and the 26th February 1814, are respectively usurious and void, and let the same be given up to be cancelled. The Master to be at liberty to state any special circumstances. Further directions and costs reserved.

## F. W. Hulkes and others, infants, by their next friend, plaintiffs; and Barrow and others, defendants.

1 *Tamlyn*, 264.

T. H., by his will, devised certain freehold and leasehold property to a trustee, upon trust, to permit his son, T. E. H., to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same; remainder upon trust for the sons of T. E. H. in fee, as tenants in common. The tenant for

* The words in *italics* have been added by arrangement between the parties.

life became bankrupt, and afterwards died. His assignees received a sum of 2000*l.* subsequent to the bankruptcy for rents: Held, that these rents were liable to the fines for renewal.

*Rolls*, Dec 15, 1829.

## Ann Nicholas, widow, and others, plaintiffs; and Edward Nicholas and T. F. Lewis, defendants.

1 *Tamlyn*, 269.

R. N. by his will, gave all his personal estate to R. F. and J. N., that is to say, (he then enumerates several particulars) in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, until the legacies, debts, and charges thereinafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children; and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son.

Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned.

*Rolls*, December 2, 1829.

ROBERT NICHOLAS, Esq., by his will, bearing date the 20th May 1818, devised all his real estate to Thomas Frankland Lewis, Esq. and his heirs, to the uses therein mentioned, and then declared his will to be as follows:—"And my will and intention is, that all the said manors, messuages, and tenements, farms, lands, tithes, hereditaments, and premises so devised as aforesaid to the said T. F. Lewis and his heirs, shall continue liable and charged, exclusively of my personal estate, with all the mortgages and bond debts which when I die shall be charged upon the same and unpaid, such debts having all accrued by my wish to create an improvable permanent fund for the provision of my present large family. And I further give and devise my personal estate to the said Roger Frankland and John Nicholas, and the survivor of them, and the executors, administrators, and assigns of such survivor, that is to say, my leasehold house in which I reside in Wimpole street, my insurance of 5000*l.*, payable by the Equitable Insurance Company. Also my insurance of 3000*l.*, payable by the London Life Insurance Company; and my insurance of 2000*l.* payable by the Sun Fire Insurance Company; my security in the turnpikes (therein described); my rents in arrear; my salary of office; all and whatever moneys I may at such time have in the funds, and the interest thereof, and other moneys whatsoever, in trust for the following purposes, that is to say, I hereby will and declare, and it is my will and intention, that the same be not liable or resorted to for the payment of my mortgages or bond debts, or for my aforesaid annuities and legacies, until the legacies, debts, and charges *hereinafter* mentioned shall be satisfied and paid; and when and as soon as that can be effected, it is my will and intention that the same shall and may be liable and resorted to for relief of my said real estates. And I therefore first will and direct that

my simple contract debts be paid thereout, and then I give therefrom to my dear wife Anne, if she survive me, the sum of 700*l.*, without interest, to be paid to her within seven months after my decease." And he then gave the sum of 300*l.* to trustees, who were to pay the dividends thereof to his wife for her life, if she continued his widow; and in the events therein mentioned the 300*l.* was to be residuum of his personal estate. And the testator gave to his children other legacies, and an annuity to his wife's parents, and further declared his intention as follows: "And I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain *after the respective charges hereby made thereon*, to my dear son Edward Nicholas, or such other as shall be my eldest son at the time of my decease; or in case of the death of all my sons before me, to my then eldest daughter."

By a decree made in this cause on the 1st December 1827, the Master was directed to take the accounts of the personal estate; and, in doing so, to distinguish between such parts thereof as consisted of the particulars mentioned in the will, and such parts thereof as constituted the rest and residue of such personal estate and effects. The Master found, and by his report certified, that the rest and residue of the testator's personal estate, consisting of particulars set forth in the third schedule thereto, received by Edward Nicholas, amounted to the sum of 349*l.* 8*s.* 7*d.* and that there were some other particulars then outstanding.

This cause now coming on for further directions, the question was, whether the whole of the personal estate of the testator passed to R. Frankland and John Nicholas, and was by the will (after payment of the simple contract debts and legacies charged thereon) subject to the payment of the testator's bond and mortgage debts in exoneration of his real estates.

Mr Bickersteth and Mr Tennant, for the plaintiffs, the widow and younger children, contended that the will was clear; that the testator by his first gift intended to comprise the whole of his personal estate, such words as 'scilicet' are merely words of suggestion or amplification, and are not words of restriction or exception.

Mr Treslove and Mr Roupell, jun. for the defendants. Why should there be this extensive specification if the testator meant the whole of his personal estate, which might have been described as his personal estate? Nothing but the enumerated articles can pass, Wild *v.* Holtzmeyer, 5 Ves. 310; at least, connecting the general clause with the special clause, there is certainly a doubt whether the whole personal estate passed by the first bequest. Where there is a clear intent to pass the whole, the court will enlarge the specified terms, Chalmers *v.* Storil, 2 V. & B. 222; but when such intent does not appear, the court will not do so. The case before the court does not come within that class of cases in which the court struggles to prevent intestacy, for here the residue is disposed of, Rawlings *v.* Jennings, 13 Ves. 39. The intent of the testator was, that the personal estate generally should be exempted from the mortgage and bond debts which he charged upon the realty;

and that is not inconsistent with his carving out a portion of the personal estate, Howard *v.* Lord Rous, 18 Ves. 131.

The MASTER OF THE ROLLS.—The testator meant to subject his whole personal estate to the same trusts as he has declared with respect to his house in Wimpole street, and the other enumerated articles. He gives his personal estate to his executors, and proceeds to enumerate it. It so happened that he omitted some particulars. He directs what they are to do with the subject of the gift: to pay certain debts, legacies, and charges, and concludes with a residuary gift, "I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain after the respective charges hereby made thereon, to my son Edward Nicholas."

Now what had he affected with those charges? Why he had affected his whole personal estate. It is perfectly clear what the intention of the testator was.

Declare that the residue comprised in the third schedule to the report, is subject to the charges with the other personal estate enumerated.

By the decree it is declared that the general personal estate passed to Roger Frankland and John Nicholas, and ought to be applied in or towards payment of the bond and mortgage debts of the testator in exoneration of the real estate.

Reg. Lib. B. 1829. fol. 301.

## Harrison *v.* Harrison and others, and his Majesty's Attorney-General.

1 *Tamlyn*, 273.

Testator directed the produce of his real and personal estate to be invested.
Part of the personalty consisted of mortgages and securities on real and leasehold estates.
Part consisted of a sum of money due on a covenant to sell a freehold house.
Testator gave various legacies to charities.
He also gave the residue to charities.
Held void as to the mortgages and money due on the sale of the freehold.
The charities to abate *pro ratâ* in respect of the legacies and residue.
A bequest to the widow of testator in lieu of dower does not preclude her from her claim on the personal estate as the widow of a freeman of London.
Bequest of a sum of 50*l.* to each of the three children of A. Now A. had five children:
Held, that each child was entitled to 50*l.*
*Rolls*, Dec. 3, 1829.

HENRY HARRISON, by his will, after giving 1000*l.* to his wife in lieu of dower, and several small legacies, and directing the produce of his real and personal estate to be invested, and the dividends or annual income thereof to be applied for the use and benefit of his wife and daughter and the survivor of them, directed that the principal monies should be applied in payment of the several legacies thereinafter men-

tioned: they were legacies to relations and other persons, and several legacies of 100*l.*, 200*l.*, and other sums, to eleven different charities; and after the death of his wife and daughter, the testator declared, that the trustees of his will should stand possessed of the residue of his personal estate, in trust for the same eleven charities. This bill was filed by the next of kin of the testator's daughter, Mary Lydia Harrison, and prayed, that the devise and bequest by the testator to the treasurers of the several charities of his freehold and leasehold premises, and of the monies to be produced or to arise by the sale thereof; and also of the monies due to the testator at the time of his death on mortgage, secured by the deposite of title-deeds, or otherwise connected with real estate, should be declared void by force of the statute, and that the testator should be declared to have died intestate with respect thereto; and that the usual accounts might be taken by the Master.

At the original hearing, it was referred to the Master to take an account of the personal estate, and the Master was to distinguish what part of the personal estate did not consist of leasehold property, or of money lent upon mortgage, or upon the deposite of title-deeds, or was otherwise connected with real estate. And the Master was also to state, what real and leasehold estates the testator died seised or possessed of, and what part of the testator's personal estate was, at the time of his death, outstanding upon mortgage, or upon the security of title-deeds deposited with him, or otherwise connected with real estate.

The Master found, that the testator, at the time of his decease, was possessed of a freehold house, which he had demised for a term of seven years, and covenanted to convey at the expiration of the term, in fee, upon being paid 700*l.*; this term expired after the death of the testator, who, by his will, directed the sale to be completed; and the lessees were ready to pay the 700*l.* and complete the contract on their part. The Master also reported, that the testator was possessed of a leasehold house; that he was entitled to 3000*l.*, secured by mortgage of freehold and leasehold premises; to a sum of 200*l.* on a promissory note, accompanied by a deposite of a lease for a term of years; to a further sum of 700*l.* secured by a mortgage of copyhold premises; and divers other sums of money, secured on mortgage of freehold and leasehold property. The amount of all the sums arising from leasehold estates, and secured on mortgage and otherwise on real estate, was 6829*l.*; and the amount of the other sums, not arising from leasehold estates or money secured on mortgage, was 6041*l.*

The several pecuniary legacies were paid some time since.

The legacies, and funeral and testamentary expenses (except the legacies to charities, and also the legacy to the widow, which had been satisfied by a transfer of stock,) amounted to 4876*l.*; and, in fact, the pure personal estate, unconnected with realty, amounted to what was almost sufficient to cover the charitable as well as the other legacies.

The contract for the freehold house has since been carried into effect.

Mr Bickersteth and Mr Jeremy, for the plaintiffs, contended that the gift to charities of so much of the general estate as was connected with the realty would fail, 9 G. 2, c. 36, and go to the next of kin. There were many cases on this subject.

Mr Wray, for the Attorney-General.

The testator having contracted in his lifetime for the sale of the freehold, it became personal estate; and in the case of Jemmett *v.* Virril, Lord Gifford held that it became personal estate.

This point then stood over to be argued on the Monday following.

*December 5*.—This cause was again mentioned.

The Master of the Rolls, after adverting to the words of the will, proceeded thus:

The mortgagee has the legal estate in the land, subject to redemption. If the mortgagor does not redeem, the mortgagee becomes the absolute owner; and, therefore, it is an interest in land within the meaning of the statute. Now where is the difference between a mortgagee and a vendor under a contract only, no money having been paid? Is the mortgagee possessed of the legal estate? So is the vendor. If the mortgage is not paid, the estate of the mortgagee becomes absolute. So if the vendee does not pay the purchase-money, the vendor retains the absolute property of the land. This, therefore, is an interest charging the land; and though it does not come within the words of the statute, is plainly within its equity.

Another point in this case was this: the testator, by his will, gave his wife 1000*l.* in lieu of dower.

The testator, as was found by the Master's report, was a freeman of London; and it was urged that the legacy barred her customary rights to the personalty as the widow of a freeman.

The court held that the widow was bound to elect between her dower and the 1000*l.*, but that she was not by that bequest precluded from taking any part of the personal estate to which she was entitled as the widow.

Decree. The funeral and testamentary expenses, debts and legacies (except the legacies to charities,) and the costs, to be paid out of the pure personal estate and his personalty connected with real estate, *pro ratâ*.

So much of the charity legacies as is proportioned to the amount and value of the personal estate as consisted of mortgages, money lent upon the deposite of title-deeds, leasehold, and other interests in, or any charges or incumbrances affecting real estate, is void by virtue of the statute 9 G. 2 c. 36.

So much of the charity legacies as is proportioned to the amount and value of the other parts of the personal estate, is good.

The gift of so much of the residue of the testator's personal estate as does not consist of mortgages, money lent upon the deposite of title-deeds, leasehold and other interests in, or any charges or incumbrances affecting real estate, is good.

So much of the residue as consists of mortgages, &c., is undisposed of, and is devisable between Mary Harrison, the widow, and the next of kin of the testator living at the time of his death, and their representatives.

[Harrison *v.* Harrison.]

The testator having been a freeman of the city of London, the widow is entitled to four ninths, and the other five ninths go to the administrator of the testator's daughter, his only next of kin.

The covenant in the lease did not convert the proceeds of the sale of the freehold house into pure personalty, so as to exempt it from the 9 G. 2. c. 36., and the same is to be considered as part of the testator's property connected with the real estate.

The widow is entitled to the 1000*l.* bequeathed to her in bar of dower, and she is not by the bequest thereof precluded from taking any part of his personal estate to which she is entitled as such widow.

The testator having also given to the two sons and the daughter of Thomas Lovell 50*l.* each, and the Master having reported that Thomas Lovell had in fact five children, viz. one son and four daughters, the court decreed that the five children were severally entitled to 50*l.* each.*

Reg. Lib. A. 1829. fol. 493.

## Lord Dorchester and others *v.* The Earl of Effingham and others.

1 *Tamlyn*, 279.

Executors depositing moneys belonging to the estate, with the same persons as the testator entrusted with his moneys in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy.

*Rolls*, December 16, 1829.

THIS was a suit for carrying into execution the will of the late Lord Dorchester, and the cause now coming on for further directions, the question was, whether Mr T. P. Courtenay, the surviving executor, should be personally charged with the loss of 1577*l.* 14*s.* 2*d.* occasioned by the failure of Messrs Goodall and Turner, or that the loss should fall upon the estate of the testator?

At the original hearing it was ordered, that the Master should inquire whether any, and what sum of money forming part of the several balances reported due from the defendants upon the several accounts in the Master's report mentioned, or which should be reported due from them, or any of them, upon the accounts thereinbefore directed to be taken, or carried on, were at any time or times, and when, deposited by the defendants Richard Earl of Effingham, Thomas Carleton, and Thomas Peregrine Courtenay, or any of them, in the hands of any and what bankers or agents, or were received by any such bankers or agents, and whether they at any time, and when, became bankrupts; and whether any and what sum or sums of money, forming part of such respective balances, remained in the hands of such bankers or

* See Tomkins *v.* Tomkins, 3 Atk. 257. and 2 Ves. 564. Garvey *v.* Hibbert 19 Ves. 125. Stebbing *v.* Walkey, 2 Bro. Ch. Ca. 85.; 1 Cox, 250. Scott *v.* Fenhoulet, 2 Bro. C. C. 86, and Sleech *v.* Thorington, 2 Ves. 560.; and see note to Parsons *v.* Parsons, 1 Ves. jun. 267. 2d edit.

agents at the time of their becoming bankrupts. And the Master was to state any special circumstances.

The Master by the report found, that the several sums of money therein mentioned had been received by Messrs Goodall and Turner as the bankers of the executors, and that a balance of 1577*l.* 14*s.* 2*d.* remained due from them at the time of their bankruptcy. And the Master found the following special circumstances:—That the testator for several years preceding his death employed Messrs Goodall and Turner, of Garlick Hill, London, merchants, as his agents in London, they having succeeded to the business of Sir Brook Watson, who was an old and intimate friend of the testator. That they were empowered by the testator to receive the dividends upon his stock, and they accordingly received the same until his death, at which time there was a balance of 265*l.* 16*s.* 8*d.* in their hands; and that after the death of the testator the defendants, the executors, continued to employ the said Messrs Goodall and Turner as their bankers, attorneys, or agents, in like manner as they had been employed by the testator in his lifetime; and that all moneys which came to the hands of the defendants, the executors, were paid into the house of Messrs Goodall and Turner on the executorship account of the defendants. And he found that Messrs Goodall and Turner were merchants trading principally to Canada, and not bankers generally; that a commission of bankrupt was issued against them in the month of June 1817, by the description of William Goodall and John Turner, of Garlick Hill, in the city of London, merchants and copartners, dealers and chapmen, upon which they were declared bankrupts; at which time there remained in their hands a balance of 1577*l.* 14*s.* 2*d.* due to the said executors as thereinbefore mentioned.

The will of the testator did not contain any clause to indemnify the trustees against any loss which might happen to the trust property by being deposited with any banker or other person for safe custody.

Mr Tinney and Mr Walker, for the plaintiffs.
Mr Bickersteth, for the executors.
Mr Teed, for lady Dorchester and another.

The Master of the Rolls thought that no blame could be imputed to executors, who employed the same persons as the testator had placed confidence in. An executor was not chargeable unless he acted from corrupt motives, or *crassa negligentia*. It was not the practice of the court for executors themselves to apply to pay moneys into court. The court does not act too rigidly towards executors, the office being a difficult one; if it did, no one would be found to act as executor.

His honour decreed that the executors were not liable for the moneys lost by the failure of Messrs Goodall and Turner.

Reg. Lib. B. 1829. fol. 633.

## Between Samuel Lees, plaintiff; and John Nuttall and William Walker, defendants.

1 *Tamlyn*, 282.

An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right.
Decreed to convey to his client, the plaintiff.
*Westminster Hall*, Nov. 24, 1829.

THE plaintiff, (in right of his wife,) and her sister, as the next of kin of Henry Wallis the younger, were entitled for the residue of two terms of 1000 years each to certain lands within the parish of Long Eaton as a security for certain sums of money, and the plaintiff was in the possession or occupation of the mortgaged premises, or in receipt of the rents and profits thereof.

The bill, after stating these facts, set forth, that the defendant Nuttall was a solicitor, and had been employed by the plaintiff to purchase the equity of redemption from Mr William Walker, the heir-at-law of the mortgagor; but that the defendant Nuttall purchased the estate on his own account. The agreement between Nuttall and Walker bears date the 29th day of March 1824; and the bill prayed, that it might be declared that the defendant Nuttall was a trustee thereof for the plaintiff, and that he should convey the same to the plaintiff on receiving from the plaintiff the purchase-money.

R. Bonsell who married a daughter of the plaintiff, Sarah the wife of John Bonsell, and Elizabeth Lees spinster, deposed, that the defendant Nuttall was employed as the solicitor of the plaintiff from the year 1817, up to the month of March 1824, and frequently came to the plaintiff's house on professional business. That the plaintiff, in the presence of deponent, consulted the defendant Nuttall about the propriety of purchasing the equity of redemption or reversion of the estate and premises, and that Nuttall advised the plaintiff to become the purchaser, and that the plaintiff authorized Nuttall to effect the purchase on the best terms he could.

Mr Girling proved a letter from Walker to the plaintiff, dated the 25th of March 1824, offering to sell the property to him for 1200*l.*, and that he delivered it to the plaintiff on the following day.*

Lees the younger deposed, that he went to the defendant Walker by the direction of the plaintiff, and told him he was come to purchase the estate, and to give him the money for it mentioned in his letter, that the defendant Walker said very well, and so it was concluded; but that the defendant Walker refused to go over to ——— to sign a more formal agreement by reason of his being lame, when the deponent said, we will send a lawyer over. This witness further deposed, that on the

* This letter was, from circumstances attending it, considered to be only a proposal, and the plaintiff's counsel then proceeded with the case on the ground of equitable fraud, and that Nuttall was a trustee for the plaintiff.

27th of March 1824, he went to the office of the defendant Nuttall, by the direction of the plaintiff, and then told him that the plaintiff had bought the estate for 1200*l.*; when Nuttall got up in a violent rage and began to swear, and said, "You have ruined yourself and your family, and I have been over there, what I have been building up you have been pulling down; why did not you come over to me at the first?" and afterwards Nuttall said, "You know I was buying it for you."—(The rest of this witness's evidence, and the testimony of the other witnesses, are set forth in his honour's judgment.)

Mr Pepys and Mr Kenyon Parker, for the plaintiff.
Mr Bickersteth and Mr Thomas Parker, for the defendant Nuttall.
Mr Douglas, for the defendant Walker.

The Master of the Rolls.—Mr Walker must have the bill dismissed against him with costs. Mr Walker, it appears, has conveyed the fee of the estate, which carries with it the equity of redemption to Mr Nuttall, consequently there is no purpose for which Walker could be brought before the court. In truth the plaintiff never had any equity against Walker, because the alleged agreement with Walker is not an agreement which, in a court of equity, would have bound Walker; at all events, therefore, Mr Walker must be dismissed, and have his costs.

With respect to the other part of the case, however strenuously and ingenuously it may be argued, it is difficult to conceive a case more clear in point of fact than this is. Mr Halls says, in the month of March 1824, he was present at a conversation between Nuttall and the plaintiff; that the plaintiff then explained to Nuttall the motives which he had to desire to become the purchaser of this particular property; that Nuttall strongly recommended him to become the purchaser, and that the plaintiff gave him an authority to buy at such price as in his discretion he thought proper. The evidence of Mr Halls in this respect is confirmed by two members of the family; they do not name the particular day, but they state the conversation precisely to the same effect as Mr Halls has stated it.

Mr Halls goes on to state, that at another time Nuttall and he conversed together on the subject of the plaintiff's purchase; that it was observed by Nuttall, that the plaintiff had no money, and that he could not become the purchaser; and Mr Halls then asked Nuttall, suppose I were to assist him with the money, could it be secured on the property? Now, Nuttall answered it could be secured by a mortgage of the property, and Nuttall proceeded to say, "I think in this case it would be wise that there should be a written authority given by the plaintiff to you and to me, (that is to Nuttall and Halls,) not only to buy the property, but to sell it again, so as to afford an immediate repayment of the money that you, Halls, as his friend, should advance towards the purchase." And, upon that occasion, Nuttall says, "I will show you what sort of an authority it should be," and he immediately writes a paper, which is produced in evidence, in which the plaintiff is made to request Mr Nuttall to prepare a power of attorney, to authorize him and Halls to purchase the property, and then to re-sell it, with

a view to the payment of what should be advanced by the plaintiff's friends. Now it is impossible to say that there can be the least doubt on these facts, that Nuttall had consented to become the agent of the plaintiff for the purpose of this purchase. But suppose all this was out of the question, suppose we knew nothing of the transaction except what takes place after the agreement which is made in consequence of the intervention of Mr Girling, a medical gentleman, who attended both families; this agreement (and it is considered a parol agreement only) appears to have been made on the 24th of March. This agreement being made, Mr Halls and the plaintiff met on the 26th; they attend Mr Nuttall, for the very purpose of having a regular written agreement prepared, in order to make it a binding contract. Now the very circumstance of their attending on Mr Nuttall for this purpose, is a most strong corroboration of the fact, that Mr Nuttall was considered by the plaintiff as his attorney for this purpose.

When they tell Mr Nuttall that the plaintiff has engaged to pay 1200*l.*, and agreed with him to prepare a written agreement, Mr Nuttall says, "Why you have thrown 2 or 300*l.* away; if Girling had not interfered, and this transaction had been left to me, I should have been able to have purchased this for 2 or 300*l.* less; you have in truth thrown away, therefore, this sum. Now my recommendation to you (and it is a recommendation in his character of attorney) is, that you should immediately go to Mr Walker, and be off this agreement if you can." This is the recommendation that Mr Nuttall gave.

Well, now, suppose there was nothing else in the case; here these parties apply to Mr Nuttall as their solicitor with respect to this purchase, as their agent in this purchase, and he advises them, that they have given too much, and recommends it to them to endeavour to be off the bargain. They are not, however, at all disposed to follow this advice, they are content with the sum which is agreed to be given. Now, this is on the 26th; on the 27th, there is a conversation with Mr Halls, and he repeats to Mr Halls what he had said to Girling and the plaintiff's son; he tells him they have given this sum of money, and that he considers it was so much money thrown away. The 27th happened to be on Saturday; on the Monday, Mr Nuttall goes to Walker and enters into a written agreement with him to purchase this property, which he had told the plaintiff's son and Girling, that he had given 2 or 300*l.* too much for; he agrees to purchase it for 1100*l.*, giving himself, therefore, nearly 200*l.* more than he stated ought to be given, and as to which he advised them to decline the purchase because the price was excessive.

This circumstance alone would fix on Nuttall the character of agent in this transaction, and would make it impossible for him to hold this purchase to his own use. I am clearly of opinion, therefore, that Mr Nuttall must be considered as trustee for the plaintiff, and that upon payment of the purchase-money by the plaintiff, he must be directed to convey the equity of redemption of this estate to the plaintiff, and all other parties must join in that conveyance. Mr Walker is certainly not a necessary party to that conveyance, having already conveyed the fee of the estate, which carries with it the equity of redemption to the plaintiff Nuttall.

The plaintiff must pay Walker his costs of this suit; and Mr Nuttall

must pay to the plaintiff his costs, excepting the costs to be paid by the plaintiff to Walker.

Reg. Lib. B. 1829. fol. 513.

**Between Edward Beastall, and Mary Anne, his wife, and Jane Swain, an infant, by the said Edward Beastall, her next friend, plaintiffs; and John Swain, George Bell, and Hannah, his wife, Ann Swain, widow, and John Roadhouse, and Elizabeth, his wife, defendants.**

1 *Tamlyn*, 288.

An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died.

The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family.

*Rolls*, December 9, 1829.

IN the month of October, 1815, William Swain, the grandfather of the plaintiffs, had living three children, viz. John Swain, Hannah, the wife of George Bell, and Elizabeth Swain, afterwards the wife of William Wilford, and now the wife of John Roadhouse.

In the same month, William Swain had two grandchildren, the son and daughter of his son William Swain, then deceased, viz. the plaintiffs, Jane Swain, and William Swain now deceased.

In the same month, William Swain, the grandfather, had three grandchildren the children of his daughter, Ann Healey, then also deceased, viz. George Healey and William Healey, and the plaintiff Mary Ann, now the wife of George Beastall.

In the same month, W. Swain, the grandfather, duly made and published his last will and testament in writing, bearing date the 10th October 1815, attested, as by law required, for passing real estates, and thereby gave and devised his estates at Gunby and Sewstern, unto Christopher Compton and George Bell, their heirs and assigns, in trust to sell the same, and by means thereof to secure 500*l.* for the benefit of the plaintiff Mary Ann Beastall; and as to the residue of the moneys so to arise therefrom, for the benefit of the plaintiff Jane Swain and

[Beastall *v.* Swain.]

William Swain the grandson, and the survivor of them; but in the event of both of them (William Swain the grandson, and the plaintiff Jane Swain) dying under the age of twenty-one years, then the plaintiff Mary Ann Beastall, and all his (the testator's) children who should be then living. And the testator then proceeded to dispose of his personal estate and effects, by giving legacies to John Swain, Hannah Bell, Theodosia Glenn, and Elizabeth Roadhouse. The testator afterwards made a codicil to his will, dated the 22d May 1816, and thereby gave other legacies.

In the month of July, 1817, William Swain, the grandfather, was about eighty years of age, and residing at Eaton, with his daughter Elizabeth. The testator, having removed to the house of John Swain, made another will in July, 1817, whereby he devised his real estates to Christopher Compton and George Bell, for 1000 years, to raise 500*l.* for Mary Ann Beastall; and subject thereto he gave his estates to William Swain the grandson, his heirs and assigns for ever; when he should have attained his full age of twenty-one years; but, in case his said grandson should die under that age, then he devised his estates to John Swain, his heirs and assigns for ever: he then gave several legacies, and the residue to John Swain.

This will having come to the knowledge of the other children, they threatened to dispute the same, and thereupon an agreement was entered into, bearing date the 12th March, 1818, between John Swain of the one part, and Elizabeth Swain, (now E. Roadhouse, and a defendant in this suit,) and the defendants George Bell and Hannah his wife, of the other part, reciting the particulars of the testator's property, and that for the purpose of making a fair and just division of his property unto and amongst his family, and to prevent litigation in case of his death, it had been mutually agreed, and it was thereby witnessed, that the estates at Sewstern and Gunby should be conveyed in trust for the plaintiff Jane Swain and William Swain the grandson, their heirs and assigns, subject to the payment of 500*l.* to Mary Ann Beastall, and an annuity to the testator's sister, with an executory limitation over to all the surviving children of the testator, in the event of their deaths under twenty-one, and subject to the life estate of the widow of William Swain the son.

The agreement provided for the distribution of the other property of the testator, of which 825*l.* was to be paid to John Swain, 1612*l.* to the plaintiff Elizabeth Roadhouse, and 1312*l.* to George Bell, in right of his wife, and the residue was to be divided between those three.

The testator died the morning after this agreement was executed, and in April, 1818, John Swain proved the will of July 1817.

The *personal* property of the testator was divided according to the agreement.

By an indenture bearing date the 17th August 1818, between John Swain of the first part, William Wilford and Elizabeth his wife, then Elizabeth Roadhouse, of the second part, and George Bell and Hannah his wife of the third part, reciting the will bearing date the 29th of July 1817, and that the testator died on the 13th day of March 1818, without having altered or revoked his will, leaving John Swain, Elizabeth Wilford, wife of W. Wilford, then Elizabeth Swain, spinster, and Hannah Bell, his only children, and William Swain, Mary Ann Healey,

and the plaintiff Jane Swain, his grand-children, him surviving; and further reciting that the will conferred greater benefit on John Swain than was intended for him by a certain other will made by the testator, bearing date the 10th day of October 1815, and that disputes had arisen, and were then depending, between the parties touching the will of the 29th day of July 1817, and the validity thereof, so far as the same will purported to confer a greater benefit upon John Swain than the benefit intended him by the will of the 10th day of October 1815, and that the parties thereto had agreed to compromise their disputes; and in regard to the said estates they had agreed that the same should be conveyed and assured so and in such manner that upon the happening of the contingency, and the event of William Swain the grandson dying before he attained twenty-one years, the messuage, land, tenements, and hereditaments might thereupon be and become effectually vested in fee tail general in the testator's grand-daughter, the plaintiff Jane Swain, with remainder in fee simple to John Swain, Elizabeth Wilford, Hannah Bell, and Mary Ann Healey, as tenants in common, subject nevertheless and without prejudice to the payment of two several sums of 500*l.* and 200*l.* charged thereon by the will of the 29th of July 1817. It was witnessed that, in consideration of the premises, John Swain, for himself, his heirs, executors, and administrators, covenanted with George Bell, his executors and administrators, in trust for himself and all others whom the covenants thereinafter contained did, should, or might concern, that he, John Swain, and his heirs, should at all times thereafter, upon every reasonable request, do and execute all acts and deeds for lawfully and satisfactorily conveying and assuring the said estates, pursuant to the agreement of compromise; and further, that John Swain and his heirs should, upon the happening of the contingency, and in the event of William Swain, the grandson of the testator, departing this life before attaining twenty-one, thenceforth in the mean time, and from time to time until such assurance should be made pursuant to the covenant in that behalf thereinbefore contained, stand and be seised of or entitled to the estates, in trust for the plaintiff Jane Swain, in fee tail general, with remainder to John Swain, Elizabeth Wilford, Hannah Bell, and Mary Ann Healey, in fee simple, as tenants in common.

By a certain bond or writing obligatory under the hand and seal of John Swain, he bound himself unto George Bell in the penal sum of 3000*l.*, with a condition that if John Swain, his heirs, executors, administrators, or assigns, should perform and keep the covenants and agreements contained in the indenture or agreement of the 17th of August 1818, then the bond or obligation to be void.

Christopher Compton, the co-trustee, is dead, and William Swain the grandson died in the year 1820, intestate, unmarried, and without issue. John Swain brought ejectments on the demise of himself and George Bell, to obtain possession of the estates. The bill charged that George Bell had destroyed the bond, and executed a release thereof to John Swain, and prayed that the destruction or cancelling the bond, or the release or discharge thereof, might be declared a fraud against the plaintiffs, and a breach of trust by the defendant George Bell, and that such release or discharge might be delivered up to be cancelled, and that the plaintiff Jane Swain might be declared entitled to the benefit of the covenants and agreements contained in the indenture and bond, and

to have the same specifically performed and carried into execution; and that the estates might be conveyed, and settled and assured, according to the covenants contained in the indenture, so far as the same was capable of being so conveyed; that is to say, to the plaintiff Jane Swain in fee tail general, with remainder to John Swain, Elizabeth Roadhouse, Hannah Bell, and the plaintiff Mary Ann Beastall, in fee, subject to the charge of 500*l.* in favour of the plaintiff Mary Ann Beastall; or if it should appear to the court that the covenants and agreements contained in the indenture and bond ought not to be specifically performed, then, that the agreement of the 12th March 1818, might be decreed to be specifically performed by the parties thereto, and in particular by the defendant John Swain.

On the part of the plaintiffs, there was evidence that John Swain kept the testator in his house, and prevented any access to him by his children and grand-children.

There was also evidence that the agreement was entered into in consequence of disputes in the family, by way of family arrangement, and to avoid litigation. On the part of the defendant there was evidence that John Swain, in executing the deed, understood that the effect of it was to carry the agreement into execution.

There was also evidence, that at the time of entering into the agreement, it was settled that it should be taken to the testator for his approbation, and that both wills should be cancelled by him, but that the testator died before the party intrusted with it could get to the residence of the testator.

Mr Bickersteth and Mr Wakefield, for the plaintiffs.
Mr Pemberton and Mr Barber, for some of the defendants.
Mr Richards, for the other defendants.

The Master of the Rolls. It is extremely true that the agreements, upon the face of them, appear to be family arrangements; and with respect to them, the court does not attend to the points which it requires in other agreements. (His Honour here stated the wills and the facts.)

John Swain induces his father to remove to his house, and a will is then made, by which John is to have the whole estate, if William his nephew, should die under twenty-one; and the whole personal estate. The will becoming known, created great discontent in the family. On the 12th March 1818, an agreement is entered into, and by that agreement the interest of John is greatly diminished. It was the intention of the parties to communicate the agreement to the testator for his approbation; this was not carried into effect, the testator dying on the following day. The first question is, if it were the intention of the parties to the agreement only to recommend the testator to make a new will to carry the agreement of the 12th March into effect? Jane Swain too was than an infant. It would be impossible to carry into execution the agreement of the 12th March; it was not an agreement to operate without the approbation of the testator. Then as to the subsequent arrangement, that does not carry into execution the agreement of the 12th March; and it was the intention of John so to do, he having divided the personal property. It is impossible for the court to

execute the deed, when it is in evidence that he intended to carry into execution the first agreement.

I must dismiss the bill; but from the conduct of John, in confining the testator, I shall not give costs.

Reg. Lib. A. 1829. fol. 167.

## Baily *v.* Taylor.

1 *Tamlyn*, 295.

The court does not give an account of the sale of a pirated copy of a work, unless it grants an injunction.

The injunction is the ground of the accounts.

That injunction may be granted at the hearing.

The account is consequential.

The court will not grant an injunction after a considerable lapse of time; and where a piracy is only of a small part of a work, and is itself a matter of calculation, the court was of opinion that to interfere would not be a fair exercise of its jurisdiction.

*Rolls*, December 9, 1829.

THE plaintiff is the author of a book entitled "Doctrine of Interest and Annuities," and of another book entitled "The Doctrine of Life Annuities and Assurance;" and he is also the author of a book entitled "Tables for the purchasing and renewing of leases for terms of years certain, and for lives, with rules for determining the value of reversion of estates after any such leases, and for the solution of other useful problems adapted to general use;" each of which works contained various tables and calculations. The first work was published in 1808, the second in 1810, and the third in 1802; of the last work three editions had been published, of the two latter only one.

In 1811, the defendant published a book, entitled "Tables for the purchasing of estates, freehold, copyhold, leasehold, annuities, &c.; and for the renewing of leases held under Cathedral Churches, Colleges, or other Corporate Bodies, for terms of years certain and for lives, together with several useful and interesting tables connected with the subject; also five tables of Compound Interest." Thirteen of the tables of the defendant's work had the appearance of being copied from the plaintiff's tables, but nine of them were traced to former works. The plaintiff called upon him, and desired him to discontinue the publication or expunge the tables; but at length consented to the publication of that edition, provided a new preface were printed to it, containing the following words:—"It may be proper here to say, that some of the tables originally appeared in the works of Mr F. Baily on leases and on annuities, from which they have been selected."

On the 19th December 1811, the defendant sent the plaintiff a printed copy of the book, with the following letter:—

Sir,—I do myself the honour to send, for your acceptance, a copy, of Mr Inwood's tables with the new preface, containing the paragraph

proposed by you respecting your works. This will be inserted in all the books which remain unsold by,

"Sir, your very humble servant,

"Jos. Taylor.

"59, *Holborn, Sept.* 19th 1811."

The bill was filed on the 18th of August 1824, and stated that the consent given by the plaintiff was only to the first edition; and the plaintiff charged, that, since 1811, the defendant had printed a great number of copies of his work, containing the plaintiff's tables, and sold them as copies of the first edition; and that the defendant had also published second and third editions; and the bill prayed for an account and injunction.

The defendant by his answer stated, that most of the tables in the plaintiff's books were copied from old works, and that the computations of the other tables were so simple and easy, as to be little beyond a mere mechanical operation; and the defendant said, that the object of the plaintiff in making the application to him was, to obtain the gratification of the complimentary notice of his works in the preface, and not as acknowledging any right in the plaintiff to any part of the defendant's work, or that he had any ground or intended to complain thereof, either at law or in equity; and the defendant considered all questions between him and the plaintiff set at rest: and the defendant further said, that he never considered what then passed between him and the plaintiff confined to the first edition of the defendant's work, but that the same extended to further editions thereof; and the answer further pointed out the difference between his tables and those of the plaintiff.

In 1824, the plaintiff applied to the Vice-Chancellor for an injunction, which was refused. On the part of the plaintiff there was the deposition of one witness, who proved that he was present at an interview with the parties in 1811, when the plaintiff remonstrated strongly against publishing the books, and threatened to take measures to put a stop to the sale thereof; and the defendant then acknowledged, that the tables pointed out were taken from the book of the plaintiff, but pleaded, that he had been put to a very great expense in publishing the book, and that it would be very hard to deprive him of the sale of it; and that the plaintiff, at the request of the defendant, consented that the sale of that edition (being the first edition) might continue, on condition that in all the future copies which the defendant should sell, he should introduce a new preface, in which an acknowledgment should be inserted, that the tables so printed had been copied from the works of the plaintiff, the plaintiff expressly limiting that privilege to the then first edition of the book or work.

This, however, as has been previously stated, was denied by the answer.

The evidence of the defendant went to prove, that the calculation necessary for forming these tables would cost but a few pounds.

The Master of the Rolls. Does not the jurisdiction of this court depend entirely upon the injunction? I should like to have this point argued. I have a recollection of cases that determine that the injunction is the ground of the account: it is the injunction that gives the account, the remedy is by an action at law; in aid of the action you may

file a bill of discovery. The account is merely consequential. I think, upon general principle, without authority, it must be so.

(To stand over for argument on this point.)*

* The editor has been supplied with the following report of the judgment of the Vice-Chancellor, on the motion for an injunction, but he can not answer for its accuracy.

*Dec.* 22, 1824. The Vice-Chancellor. The question here is, whether this be a case for the extraordinary interposition of a court of equity; whether this plaintiff has made out a probability of injury so great and of so much importance as to entitle him to call for redress, and that it is fit that a court of equity should interfere; or whether he should be left to pursue his remedy at law? Now the facts of the case, independently of the license, are these:—The plaintiff publishes three works of great bulk, one of the works being two octavo volumes, another one octavo, and a third likewise in an octavo volume; and he says, there are thirteen tables published by the defendant, in a small work selected from these three great works, and which thirteen tables are in truth copies; the plaintiff then goes on to state, that the thirteen tables so copied are the work of calculations published by him, and so I take the fact to be; but, in truth, every one of these thirteen tables, except four, were calculated before the plaintiff's work, and are existing in other works previously published; and therefore, the defendant considers them as not a computation on the part of the plaintiff, upon which he is entitled to the protection of the court under the statute. I am not, however, of that opinion; for although there were previously similar calculations, yet if they were calculated by him, although calculated by another person before him, they are a work of computation as to which he is to be protected by the statute.

But although he be so entitled to protection under the statute, they are spread over the plaintiff's works through these four volumes, and occupy but a small portion of the little work of the defendant. Now what is the nature of the injury the plaintiff complains of? His title to his own book is, that he calculated these tables; the defendant says, that by calculating those tables he has the same right with the plaintiff, and if the court were to interfere to prevent such a publication only for twenty-four hours, yet in that time the defendant might acquire the same right to these tables as any other person by such calculation. Under such circumstances, I should doubt whether it is a case for a court of equity to interfere. If it stood upon that point alone as to these thirteen tables, as his title is merely a calculation made by himself, or which he and other persons in a few hours would be competent to make, and which might be made in twenty-four hours, so as to give the defendant a right to publish the work, I should doubt if I could, under such circumstances, interfere if the case were to rest there. But there are other grounds to induce the court not to grant the injunction. The work complained of was originally published in 1811. The plaintiff, considering that the publication of those thirteen tables was an injury to his work, makes a remonstrance to the defendant, and he agrees to write in the preface an acknowledgment that they were copied from the plaintiff's work. Now, undoubtedly, that amounted to a license. The plaintiff says, that although it were so stated, yet it was to be confined to the first edition only, and it was not stuck to in the original affidavit; but now, in an affidavit since filed, that statement is supported by his brother Arthur Baily, who was present at the time. The defendant swears that he has no recollection of any thing as to the first edition, but understood that the plaintiff was to allow him to continue the publication of this work in consequence of that sentence in the preface being added to it. Now, what happens? It appears that the defendant continues to sell his first edition which goes on to the year 1820, and then he publishes a second edition, which, by a rapid sale, sold in four years, and then there was a third edition. It is only at this late period that the plaintiff calls upon the court to interfere, when this has been in

[Baily *v.* Taylor.]

Mr Bickersteth resumed the question, whether the court could direct an account, an injunction not having been granted, cited Doddsley *v.* Kinnersley, Ambler, 403.

*December* 11.—The Master of the Rolls. As the court may grant an injunction on the hearing of the cause, I rather think the court may, on a case shown, grant an account.

Mr Fonblanque. But the difference of the case is, that an injunction has already been entertained by the court, and refused.

The Master of the Rolls. I am not of that opinion; but you all concur in the opinion I expressed the other day, that, the injunction is the foundation of the account; and at the hearing you have a right to insist upon the injunction.

Mr Wakefield. We admit the similitude, but not the piracy.

The Master of the Rolls. The defendant has not in his answer denied that he copied the tables from the plaintiff's works.

Mr West. In Wooller *v.* Whitaker,* the measure of damages was the number of books sold by the defendant. In this case it should be what our loss has been, and what benefit the defendant has gained by the piracy, not the costs of calculating the tables. Mawman *v.* Tegg, 2 Russ. 385, where Lord Eldon said, he who has made an improper use of that which did not belong to him, must suffer the consequence of so doing; if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. He has only himself to blame.

Mr Fonblanque. Your Honour being of opinion that the court can entertain the application now, I will consider it as for an injunction; for if the injunction be not obtained, the account can not be granted. This suit was commenced in 1824, when the injunction was refused.

Your Honour then assumed that these were copies of the plaintiff's works; that it was impossible to say the tables were the plaintiff's permanently, for in twenty-four hours the tables might be calculated. Is there any intervening circumstance, any thing now that was not then before the court? Rules are laid down by Sir Isaac Newton, De Moivoir, and other persons, and upon their principles the calculation of our tables was made. In the case of Burfield *v.* Nicholson, 2 Sim. and Stew. 7, the Vice-Chancellor said, "Upon reference to the prior

the market for about fifteen years. Now, that circumstance alone would prevent the court from interfering on this occasion. Upon the whole, I think that the injunction sought for can not be granted.

Injunction refused.

* This case was decided on the 8th of December 1817, and is cited in Eden on Injunctions, p. 281., under the name of Whittingham *v.* Wooler, and published from Mr Merivale's manuscripts in 2 Swanst. 428.

publications, it is proved to be indisputably true that there is not one of these figures which had not been given to the world prior to the Architectural Dictionary, and the matter not being new, the author of the Architectural Dictionary could acquire no property in these figures except by a new arrangement, but there is clearly no novelty in his arrangement.

If therefore the figures furnished by Nicholson for the Practical Builder had, in fact, been copied from the Architectural Dictionary, this would have been no piracy, because the author of the Architectural Dictionary had no property in these figures; it was his for the moment, but any other person, making the same calculation as himself, would be equally entitled to it. From the cases I can cite to the court, I could show that it is the injunction that gives the foundation of the suit for an account; but this seems admitted, and I shall, therefore, not trouble the court.

With respect to the damage: we could have been the owner of these tables for the sum of 10*l.*, and it is for the court to say, whether it will take cognizance of a subject of so trifling an amount. Then with respect to the delay: the plaintiff has lain by for thirteen years; he allowed us to publish a second edition without making any complaint, and it having been decided four years ago, that an injunction could not be granted, I submit that the court will not now give an account.

Mr Wakefield, also for the defendant. The plaintiff in 1811, complained only of tables taken from the first edition, nor did he, until 1824, file his bill in this court.

There has been an acquiescence for thirteen years. I prove four of the plaintiff's tables not to be original, and four of easy computation, and that the whole can be calculated for 7*l.* 16*s.* This is different from works of genius and science; the calculation here is merely mechanical, the calculation of a common sum of arithmetic, and can hardly be deemed a piracy of literary property.

1st. I submit, that it is beneath the court to entertain a suit for a property of so small a value.

2d. The table might as easily have been copied from the old authors as from Baily.

I admit we have not traced the four tables, but still we have the license of 1811, and we have proved that our second and third editions were publicly announced; and I submit the court will not cut down the license to the first edition. With respect to an injunction, the editions are all sold, and there remains nothing now on which an injunction can be granted; there may have been new calculations for subsequent editions of the work.

The plaintiff has never attempted to enforce his legal right. It was held by Lord Ellenborough, at nisi prius, in Cary *v.* Kearsley,* that part of the work of one author found in another was not of itself piracy, or sufficient to support an action; a man might fairly adopt part of the work of another, he might so make use of another's labour for the promotion of science and the benefit of the public; but having done

* 4 Esp. 172. See also Wilkins *v.* Aikin, 17 Ves. 424.; and West *v.* Francis, 5 B. and A. 737.

so, the question would be, was the matter so taken used fairly with that view, and without what his lordship termed the *animus furandi?* If there was no part of the book that was a transcript of the other; if the subject of the book was that which was subject to every man's observation, such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they were correct, one book must be a transcript of the other; but when in the defendant's book there were additional observations, (and in some part of the work his lordship found corrections of misprinting,) while he should think himself bound to secure every man in the enjoyment of his copyright, manacles must not be put upon science.—I submit the court ought not to grant the injunction.

Mr Bickersteth (in reply.) With respect to the tables that are not traced, it must be presumed that the plaintiff computed them; the calculations require the aid of intellect, and that of a very high character. The defendant's witness, in forming a calculation of the expense, says, he lays out of consideration the skill in the selection of tables; there is here a directing mind, and your Honour adjudged in Barfield *v.* Nicholson, that a copyright may consist of an arrangement of old matter. The evidence in 1811 was, that the tables of the defendant were copied from some or one of the works of which the plaintiff was the author, and the defendant in his preface says, they had appeared in the work of Mr F. Baily; the evidence is express, that the license of the defendant to proceed, is only for the first edition. The plaintiff had no knowledge of the second edition. Where then is the acquiescence?

It has been said, that the tables are of such easy computation that any one can make them; but what says Dr. Price? "that to make them would be an endless labour." Whoever makes them is entitled to the benefit of them.

The Master of the Rolls.—The plaintiff's works are not mere tables, but consist of letter-press to a very considerable extent. The plaintiff complains of the defendant having copied eight tables from the first work, four from the second work, and one from the third. That the publication of these tables is a piracy, is out of doubt; but the question is, whether it is fit that a court of equity should interfere? I must consider the application for an injunction as made to me this day in December 1829, and I am to consider, whether a work published in 1811, is to be prohibited by an injunction in 1829; the defendant's work was published in 1811. Is a court of equity to interfere after so many years have elapsed since the first publication? I am of opinion, that it would be contrary to principle were I to grant an injunction. The 300dth part of the work is pirated: is the court to enjoin the defendant from the publication of the whole of his work, because he has included a small part of the plaintiff's work? that taken from the work of 1802 is a mere matter of calculation, and the calculation being made, the defendant would be entitled to publish it. Would it be a fair exercise of the jurisdiction of a court of equity to interfere in such a case? I am of opinion that it would not. How could the Master calculate the value of a piracy of the 300dth part of a work? A court of law could best judge, and a Master would be a much less competent judge.

[Baily *v.* Taylor.]

Upon all these grounds I am of opinion, that this is a case upon which I can not grant an injunction, and not granting an injunction, the court can not decree an account. This bill, therefore, must be dismissed, and dismissed with costs.

Reg. Lib. B. 1829. fol. 368.

## White *v.* Smith.

1 *Tamlyn*, 306.

WOOD cut from hedges is titheable, although used on the farm.

December 11, 1829.

## Stewart *v.* Nicholls and others. Original bill. Robarts *v.* Nicholls and others. Revivor and Supplement.

1 *Tamlyn*, 307.

Twenty years are not an absolute bar to a mortgagee. It is merely a case of presumption, which may be rebutted. A supplemental bill can not be filed to an original bill in respect of which subpœnas have not been served.

*Rolls*, December 17, 1829.

PATRICK PHILLIPS, on his marriage, settled some freehold and leasehold property on himself for life, remainder to his wife for life, remainder to the children of the marriage, remainder to himself absolutely; and by deed bearing date the 25th day of January 1790, he mortgaged the same, with other leaseholds, to the plaintiff in the original suit, subject to two former mortgages.

On the 6th May 1794, a commission of bankrupt was issued against Phillips, and he was declared bankrupt.

The original bill was filed on the 19th of January 1811, but no subpœna was ever served upon the defendants. The bill prayed redemption against one of the previous mortgagees, who still remained undischarged, and foreclosure against the assignees of Phillips.

The bill of revivor and supplement was filed on the 9th March 1825, by the executors of Stewart, the plaintiff in the former suit. It set forth a former suit by one Green, a prior mortgagee, commenced in Easter term, 1796, in which the usual decree was made for taking the accounts, and for foreclosure; but before any further proceedings were had, the suit abated by the death of one of the plaintiffs therein in 1811. That suit was revived in 1814. A receiver had been appointed in 1803, who paid the balances of the rents and profits from time to time into court. Patrick Phillips went to America, and in 1824, the Master reported that he was dead. A former mortgagee was, in that suit, paid off, out of the funds in court.

The bill of revivor and supplement alleged, that a receiver having

been appointed of the rents and profits of the mortgaged premises, and the balances having been from time to time paid into court in the cause of Green *v.* Nicholls, and the principal and interest due on the mortgages in that cause mentioned being unpaid, and James Stewart being then ignorant that the contingent reversionary interest had become vested in Patrick Phillips, as thereinafter mentioned, by the decease of his wife and only child, James Stewart was unable to prosecute his cause with effect in his lifetime; and charged, that under the circumstances aforesaid, and particularly of Patrick Phillips and his son residing in America, and from the uncertainty concerning him and his affairs, that no presumption of satisfaction of the mortgage arose by lapse of time or otherwise.

The defendants, by their answer, insisted that the plaintiff's mortgage must be presumed to have been discharged, and that, from the length of time, without any acknowledgment.

Mr Tinney and Mr Wray for the plaintiff.

Mr Tinney, after stating the facts. There is no statute of limitation applicable to mortgages; it is usual to limit twenty years as a time when the mortgage shall be presumed to be paid; but where the delay is accounted for, it is otherwise:—it was held in Fladong *v.* Winter, 19 Ves. jun. 196; and it was the principle of a case therein cited, of Wynne *v.* Baring, on which fifty years had elapsed, that taking this to be a case of presumption, it may be met by evidence to satisfy a jury that the debtor had not the opportunity or the means of paying.

There are two prior mortgagees who were proceeding to recover their debts, and they did not effect their object until 1824, and that sufficiently accounts for the delay.

This can not be resisted but upon presumption of satisfaction arising from delay; when it is considered, that there were two previous mortgages, and that the property was so heavily encumbered, the presumption is rebutted: the moment an adequate cause for not enforcing the demand is shown, there is an end of the presumption of delay; the length of time that has elapsed is sufficiently answered. We find the plaintiff making inquiries, he puts his deeds into the hands of his solicitor, and when the reversion fell into hand there arose a reasonable ground that the fund was one which would be available for his debt; he then commenced proceedings, and until it was discovered, that there was an available fund, it would have been useless to attempt to enforce the debt; the presumption of payment is therefore repelled.

Mr Wray. Notice was given of the claim in 1811 to the solicitor of the first mortgagee, and all that was reasonable was done; no conclusion of payment could be come to by this court or by a jury; and with respect to reversionary property, presumption of payment can not be raised from *laches* until after it has fallen into hand.

Mr Pemberton and Mr Ching for the defendant.

Mr Pemberton. The bill of 1811 was filed in 1811, but the subpœnas were not served; and the mere filing a bill without taking any proceedings upon it goes for nothing. A bill never can be revived to which there is no appearance, still less where no subpœnas have been served. The object of this bill is to give the plaintiff the benefit of the suit of

1811; no order to revive ever has, or ever can be obtained in that suit. Are the circumstances such as to rebut the presumption of payment after thirty-five years from the execution of the mortgage? there is nothing in the evidence to rebut it: no proceedings are taken till 1825, the mortgage was executed in 1790, this gentleman became bankrupt in 1794; in all cases where relief is sought in a court of equity, it must be within twenty years, as was decided in the House of Lords in the case of Cholmondeley *v.* Clinton, and Lord Eldon held that although the plaintiff was not barred of his writ of entry, yet a court of equity will not give relief after twenty years. As against by-gone rents the mortgagee can have no remedy of any kind. Ex parte Wilson, 2 Ves. & B. 252; Gresley *v.* Adderley, 1 Swans. 573. In Thomas *v.* Bridgstock on petition before your honour, it was held and confirmed on appeal, that the possession of a receiver was only the possession of the parties to the suit; the mortgagor might have redeemed the mortgages in the suit, and then he would have had the rents, and no other mortgagee could have any right to an account of the rents; and whatever right the plaintiff may have against the reversion, he can have no claim upon the accumulated funds. If the court is of opinion, that the plaintiff is not entitled to any relief against the rents, the supplemental bill must be dismissed, because it does not pray relief out of the reversion.

Mr Ching. There are two suits now before your honour; the first suit was instituted in 1811, on which no proceedings were had, nor was any subpœna served until 1825. The principle of this court is to limit relief on a mortgage or bond to twenty years, unless the delay can be explained away, and the party must show that he has used due diligence to obtain payment. The commission of bankrupt against the mortgagor was issued in 1794; would not a vigilant mortgagee have then prosecuted his demand? the amended bill was filed in 1825, a period of more than thirty years afterwards. With regard to the by-gone rents, to the funds accumulated in the cause of Green *v.* Nicholls, a receiver is appointed for the security of the parties to the suit, and not for some bystander; that fund has since been applied to the payment of the first mortgage, and there is a fund of upwards of 5000*l.* in court. The plaintiff prayed in the supplemental bill to revive the suit of 1811, but he never obtained an order to do so, nor could he obtain it.

Mr Tinney, in reply. Our amended bill was demurred to; the demurrer was over-ruled; the defendants, by their answer, have answered the bill of 1811 as well as the amended bill.

The Master of the Rolls. Can you file a supplemental bill, when you have not issued subpœnas on the original bill; should you not have amended the original bill?

In order to entitle yourself to a decree, you must state facts upon your bill; but here you only refer to an original bill, and you can not file a supplemental bill, to a bill on which no subpœnas have issued.

I am of opinion, too, that I can not presume this debt is satisfied, for the mortgage was made in 1790, and in 1794 the mortgagor became bankrupt, so that there was only four years in which the mortgage could have been paid by the mortgagor; but this court can give no relief if there has been an *adverse* possession for twenty years.—Unless the

court be satisfied that the rents were applicable to the payment of the mortgage, would not the possession of the receiver be adverse?

Mr Tinney. The possession can not be adverse to a subsequent incumbrance, so long as the fund is held for the benefit of the first incumbrancer, so long as he remains unsatisfied; in the meantime the interest in possession of the subsequent incumbrancer does not begin.

The cause was then directed to stand over.

*Thursday, Dec.* 17.—Mr Pemberton stated that his client was not disposed to contend this cause on the point of pleading; and after what the court had said, that there was not a presumption of payment, he would consent to the plaintiff having his 1200*l.* out of the fund, on being paid the costs in this suit.

The Master of the Rolls. That is very candid; I am of opinion that there was no presumption of payment. Declare that presumption of payment does not arise in this case from delay in bringing forward the demand of the plaintiff. Let the sum of 1200*l.* 3 per cent. consols be sold out of the funds in court in the cause of Green *v.* Nicholls, and let the costs as between solicitor and client be paid out of the 1200*l.*, and the accumulations of the proportion of dividends thereof; and let the residue of the fund be transferred to the plaintiffs in full satisfaction of the principal and interest and costs due on their security; and let them at their own costs in all things execute an assignment of their security to the defendants as assignees, and deliver up the title deeds in their hands; and such assignment to be settled by the Master in case the parties differ.

Mr Tinney said he had found a printed copy of the judgment in the house of lords, in the case of Cholmondeley and Clinton, and there was nothing in it applicable to the case of mortgagor and mortgagee; Lord Eldon therein stated, that he did not mean that it should; and Mr Tinney added, that it was clear that twenty years was not an absolute presumption of payment.

The Master of the Rolls. I should certainly never extend it to mortgagor and mortgagee myself.

The Master of the Rolls asked Mr Tinney what he had found on the point of pleading.

Mr Tinney replied that he had only found that from which he hoped to have obtained liberty to amend.

Mr Wray wished the court to understand that he had always seen the difficulty in the point of pleading.

Reg. Lib. B. 1829. fol. 209.

## Southwell *v.* Ward.

1 *Tamlyn*, 314.

MR KOE. This is a suit for the appointment of new trustees. There is no power in the deed for the appointment of new trustees; but it is wished, in the new deed, to add such a power.

The MASTER OF THE ROLLS. That can not be.

*Rolls*, December 2, 1829.

## Hudson *v.* Twining.

1 *Tamlyn*, 315.

IN this case, a testator had by his will, in 1752, given legacies to several persons on their attaining twenty-one. One of them went to America when a boy, and had not since been heard of; if living, he must now be seventy-seven years of age. His legacy had been handed over many years since to the defendants, who had, by accumulations of interest, now made it amount to sixfold; and this bill was, by his personal representatives, for payment thereof to them.

The MASTER OF THE ROLLS. Take an inquiry, whether he attained the age of twenty-one, and whether he is living or dead, with liberty to report special circumstances.

Mr Roupell here stated to the court, that an objection was taken in the answer, that the personal representatives of the original testator were not parties. The testator died seventy years since.

The MASTER OF THE ROLLS thought that it was not necessary to make them parties.

December 2, 1829.

## Neathway *v.* Ham.

1 *Tamlyn*, 316.

A legacy having been given to a legatee in a name which she had for many years assumed, the court will direct an inquiry, who was the person meant.

The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest.

*Rolls*, Dec. 9, 1829.

GEORGE BRIDGE, who died in 1822, by his will gave to Mary Bridge, whom he described as his cousin, daughter of , the sum of 200*l.*, and appointed his wife residuary legatee and sole executrix; but the wife died in November 1824, without having paid this legacy, and by her will gave to Mary Hillditch, if living, 100*l.* stock.

The facts were that George Bridge and the legatee in his will were fellow-servants; she had a natural child by him, and afterwards went by the name of Mary Bridge. Her proper name was Mary Hillditch.

A witness proved, that after the death of George Bridge, on reading his will to his widow, she said that the real name of the said legatee was Mary Hillditch, and that Mary Hillditch had formerly been a kitchen-maid in the late Earl of Dorchester's service; and that she (Ann Bridge) had known Mary Hillditch at that time, and was a fellow-servant of hers and of George Bridge; and that George Bridge, previous to his marriage with Ann Bridge, had had a child by the said Mary Hillditch, and that she (Ann Bridge) was aware of the fact at the time of its taking place; that after that event Mary Hillditch had passed and been called by the name of Mary Bridge; and that her husband George Bridge had told her, after making his will, that he had left a legacy to Mary Hillditch by the name and description of Mary Bridge his cousin, but had omitted to mention the name of the legatee's parents from motives of delicacy, and from a wish to avoid exposing himself to the gentleman who drew his will, and who was at the time agent to Lady Caroline Damer; and that she (Ann Bridge) had promised her husband George Bridge, that she would see that the legacy was paid to Mary Bridge, otherwise Mary Hillditch.

The same witness further proved, that upon several subsequent occasions Ann Bridge mentioned to him the subject of the bequest to Mary Bridge, otherwise Mary Hillditch, and sometimes asked deponent whether she ought to pay it, as the legatee's name was not Bridge but Hillditch; upon which he uniformly told her that as she had promised her husband George Bridge, that she would see the legacy paid, she ought to pay it.

Several other witnesses deposed, that Mary Hillditch went by the name of Bridge, and was delivered of a female child, of which the testator was the father, but that her real name was Mary Hillditch.

Mr. Bickersteth. George Bridge by his will gave Mary Bridge 200*l.*; he appointed his wife executrix; she died in 1824, and by her will gave Mary Hillditch 100*l.* The bill alleges that the two names represented

the same person, she being a fellow-servant of the testator in the service of Lord Dorchester, and having been pregnant by him. That this is the same person there is evidence before the court.

Ann Bridge, being the personal representative, her declaration was evidence.

Mr Russell for the executor of the executrix.

This claim is brought forward after the death of the executrix, Mary Hillditch never having demanded it; and now the legacy is claimed by an administrator of Mary Hillditch. The plaintiff must first show by evidence that at the date of the will there was no such person as the testator's cousin Mary Bridge.

The Master of the Rolls.—I will give you the common inquiry, who was the person meant by "Mary Bridge my cousin," in the will of George Bridge? But I think it is an idle inquiry. There can be no doubt on the evidence that she is the person called Mary Hillditch.

There must be a decree for payment of the 100*l.* given to Mary Hillditch by Ann Bridge.

The evidence in the cause may be read before the Master.

Mr Russell objected to the admission of Ann Bridge being read.

The Master of the Rolls.—It was an admission against her own interest. You may make what use of the objection you can before the Master.

Reg. Lib. B. 1829. fol. 2015.

## Nicholson *v.* Nicholson.

1 *Tamlyn*, 319.

IN two manors in Durham there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeazance, that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator R. N. being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeazance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N. in fee. The widow being alive at the time the testator R. N. made his will, and died, it was held, that the copyholds in the manor of Houghton passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator, R. N.: Held, that there being nothing to separate the legal estate and equitable in-

terest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor: Held, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they taking benefits under the will, were bound to elect.

*Rolls*, January 27, 1830.

## Robert Lynn, and Elizabeth his wife, William Lynn, and William Bewick Lynn, plaintiffs; and Joseph Ashton, defendant.

1 *Tamlyn*, 328.

Stock settled on marriage to the separate use of the intended wife, and afterwards as she shall appoint. She assigned her life-interest to two persons for certain purposes, and appointed the capital to the same purposes.

Decreed, that the trustees transfer the stock accordingly.

*Rolls*, Jan. 28, 1830.

BY an indenture of settlement made previously to the marriage of the plaintiffs Robert Lynn and Elizabeth Lynn, dated 28th February 1797, between the plaintiff Robert Lynn, of the first part, the plaintiff Elizabeth Lynn, (then Elizabeth Cannon, spinster,) of the second part, and the plaintiff William Lynn, and William Green, of the third part. It was witnessed, that William Lynn and William Green, or the survivor of them, or the trustees or trustee for the time being, in their or his stead, should stand possessed of a sum of 650*l.* of 3 per cent. consols (which had been previously transferred into the names of William Lynn and George Green,) and all the dividends and interest then due, or to become due thereon, and all money to be received on account of such debts and sums of money as were due or belonging to Elizabeth Lynn prior to the marriage, (and which debts and money were by the now stating indenture assigned by Elizabeth Lynn to William Lynn and William Green, their executors, administrators, and assigns,) after the solemnization of the intended marriage, upon trust for the sole and separate use of Elizabeth Lynn, her executors, administrators and assigns, notwithstanding her coverture, and that the trustees should permit Elizabeth Lynn to receive all the said trust moneys, and the dividends, interest, savings, and accumulations thereof, for and during her natural life, for her own use, and notwithstanding her then intended coverture, and after her death, upon trust for such uses, ends, intents, and purposes, as Elizabeth Lynn should, notwithstanding her then intended coverture, by any deed or writing to be by her duly executed, order, give, declare, direct or appoint, and in case of no such order, gift, direction, declaration, or appointment, for her children, and in default of children, for her next of kin.

Various sums of money were from time to time received by the trustees for the time being, on account of the debts and sums of money assigned by or comprised in the settlement; and the 650*l.* 3 per cent.

consols was, by the investment of the said debts or sums of money, increased to the sum of 1400*l.*

The defendant Ashton was afterwards appointed trustee instead of Green, and the 1400*l.* was transferred into the names of him and the plaintiff, William Lynn.

By an indenture dated 23d June 1827, between Robert Lynn and Elizabeth his wife, of the one part, and William Lynn and William Bewick Lynn, of the other part, after reciting as before stated, and that the plaintiff Elizabeth Lynn was desirous (with the privity of Robert Lynn,) of assigning her life-interest in the dividends of the 1400*l.* 3 per cent. consols to William Lynn and W. B. Lynn, their executors, administrators, and assigns, and also of appointing the principal thereof, after her death, unto the last-mentioned plaintiffs, their executors, administrators, and assigns, to the intent, that they might cause the 1400*l.* 3 per cent. consols to be transferred into their names, and that they might afterwards transfer the sum of 1200*l.*, part of the same, in the manner necessary for obtaining in lieu thereof a government annuity for the lives of the plaintiffs Robert and Elizabeth his wife, and the life of the survivor, and might retain the residue of the 1400*l.* stock for the purposes therein after mentioned; it was witnessed, that Elizabeth Lynn, for the nominal consideration therein mentioned, bargained, sold, assigned, transferred, and set over, all her life-interest in the sum of 1400*l.*, 3 per cent. consols, to William Lynn and W. B. Lynn, their executors, administrators, and assigns, to hold unto the last-mentioned plaintiffs, their executors, administrators, and assigns; and it was further witnessed, that for the nominal consideration therein mentioned, the plaintiff Elizabeth Lynn, with the privity and approbation of the plaintiff Robert Lynn, did by that deed or writing, by her duly executed, order, give, declare, direct, and appoint that the 1400*l.* 3 per cent. consols should, after the death of Elizabeth Lynn, go and belong to William Lynn and William B. Lynn, their executors, administrators, and assigns; and it was thereby agreed and declared between them, and by the parties thereto, that William Lynn and W. B. Lynn, and the survivor of them, or the executors or administrators of such survivor, should, with all convenient speed after the execution thereof, procure the sum of 1400*l.* 3 per cent. consols to be transferred into the names of William Lynn and W. B. Lynn, or the survivor of them, or the executors or administrators of such survivor, for the purpose of obtaining, with all convenient speed, with 1200*l.*, part of the 1400*l.* stock such government annuity as aforesaid, and upon trust as to the 200*l.* residue of the 1400*l.* stock, to or for the use or benefit of Robert Lynn and Elizabeth his wife, in the manner therein particularly mentioned.

The bill stated the preceding facts, and that the defendant, the trustee, refused to join in transferring the 1400*l.* 3 per cent. consols; and prayed, that he might be compelled to join the plaintiff William Lynn in transferring the said sum of 1400*l.* 3 per cent. consols into the names of William Lynn and William Bewick Lynn, upon the trusts thereof declared in and by the indenture of the 23d June 1827.

Mr Pemberton and Mr Purvis, for the plaintiffs.
Mr James, for the defendant.

[Lynn *v.* Ashton.]

The MASTER OF THE ROLLS. This assignment defeats the intention, and gives an interest totally inconsistent with the intention: there certainly is no other person who has an interest. The trustees acquire by her assignment the life estate, and by the appointment the remainder over; there is no breach of trust.

Decreed as prayed, and the costs to be paid out of the fund.

Reg. Lib. B. 1829. fol. 567.

## Between George Pritchard, plaintiff; and Carter Draper and Sir Thomas Maryon Wilson, Bart., defendants.

1 *Tamlyn*, 332.

Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment.

If the debtor permits one of such partners to receive moneys in the confidence that those moneys will be a satisfaction of the partnership debt, the retainer of those moneys is equivalent to an actual payment.

*Westminster Hall*, January 28, 1830.

THE plaintiff and the defendant Draper were copartners in the business of attorneys and solicitors, and the defendant Wilson was one of their clients.

The partnership was dissolved in October 1817. This bill was filed by the plaintiff, to have an account of what was due from the defendant Wilson to the copartnership; but before the defendant Wilson had put in an answer he died,—the suit was then revived against his executors. The cause came on to be heard on the 16th July 1827, before Lord Gifford, Master of the Rolls, when his honour decreed that it be referred to the Master in rotation to tax the bill of fees, charges, and disbursements of George Pritchard and Carter Draper; and that the Master should take an account of what, if any thing, was due and owing from the estate of Sir Thomas Maryon Wilson, deceased, in respect of the said bill of fees, charges, and disbursements; and the Master was to be at liberty to state any special circumstances that might arise at the request of either party.

The Master by his report, dated 11th November 1828, reported that he had taxed the bill of fees, charges, and disbursements of George Pritchard and Carter Draper, at the sum of 768*l.* 15*s.* 8*d.* And for the purpose of taking the account of what, if any thing, was due and owing from the estate of Sir Thomas Maryon Wilson, he had caused the defendant Draper to be examined on interrogatories; and he found by a claim laid before him on behalf of the defendants, which had been duly vouched by the production of proper vouchers before him, that Sir Thomas Maryon Wilson paid to the defendant Draper, on account of the said bill of fees, charges, and disbursements, several sums of money, amounting together to the sum of 326*l.* 9*s.*, which being deducted from the sum of 768*l.* 15*s.* 8*d.*, the same was reduced to the sum of

442*l.* 6*s.* 8*d.*, which he found to be due and owing from the estate of Wilson, in respect of the said bill.

But being at liberty to state special circumstances, at the request of either party, he submitted to the court, at the request of the defendants, the executors of Wilson, the following circumstances:—

In and previous to the year 1814 the defendant Draper was the solicitor of Sir Thomas Maryon Wilson. In that year the plaintiff and the defendant Draper entered into copartnership as solicitors, and continued in such copartnership until October 1817, when the same was dissolved. During the continuance of the copartnership, Sir Thomas Maryon Wilson employed the plaintiff and the defendant Draper as his solicitors; and Sir Thomas Maryon Wilson was aware of the dissolution shortly after the time thereof. On the 25th of July 1818, a joint bill of costs was delivered by Draper to Sir Thomas Maryon Wilson, the amount of which bill was 867*l.* 5*s.* 5*d.*, including a sum of 67*l.* 17*s.* 5*d.* as the balance of a former bill of the copartnership; and the bill was accompanied by a letter, dated 25th July 1818, as follows:—

"Dear Sir,—At length I am enabled to send you my accounts, which are three in number: the first is due to Pritchard and Draper, of 867*l.* 5*s.* 5*d.*, from which, I believe, there have been received the several sums of 50*l.*, 26*l.* 9*s.*, 28*l.*, and 300*l.* The second is also due to Pritchard and Draper, and is the separate account of the parish of Fletching. The third account is owing to Draper and Bird, wherein I have given you credit for the money received from Furness for rent. At the bottom of the first bill I have not put the receipts, on account, lest by any means I have made a mistake; but I am not conscious of having so done.

"I remain, dear sir,

"Most respectfully yours,

"Carter Draper.

"Sir Thomas Maryon Wilson, Bart."

In a letter by the plaintiff to the defendant Draper, bearing date 27th October 1818, the plaintiff uses the following expression: "Will Sir T. M. W. soon settle?" And it was admitted that Sir Thomas Maryon Wilson was the person alluded to by the letters Sir T. M. W.; and that the plaintiff George Pritchard knew and was well aware that Sir Thomas Maryon Wilson continued to employ the defendant Draper as his solicitor after the dissolution of partnership. On the 17th day of February 1821, the plaintiff gave a notice to the solicitor for Sir Thomas Maryon Wilson not to pay Draper the balance of any bill or bills delivered in by him as due from Sir Thomas Maryon Wilson to the late firm of Messrs Pritchard and Draper. On the 22d of February 1821 the plaintiff and the defendant Draper signed an agreement, by which the defendant Draper agreed to give the plaintiff his bond for securing 750*l.* payable by instalments; and to assign to the plaintiff the debts contracted during the partnership, and which then remained outstanding and due to the said firm of "Pritchard and Draper;" and the defendant Draper undertook within one month to supply the plaintiff with a list of the debts then still remaining outstanding and unpaid to the said copartnership firm of "Pritchard and Draper;" but it did not appear before the Master that such list had been supplied.

On the 22d February 1821 the plaintiff delivered a copy of such

agreement to the solicitors of Sir Thomas Maryon Wilson; and the plaintiff, on the 28th of February 1821, wrote and sent the letter to Sir Thomas Maryon Wilson in the bill mentioned explanatory of such notice: that after the dissolution of copartnership the defendant Draper continued to act as solicitor and receiver of rents of estates of Sir Thomas Maryon Wilson, and continued so to act until September 1820: that on the 22d of February 1821, Sir Thomas Maryon Wilson filed his bill in this court against Draper as his late attorney and solicitor, and agent and receiver, for an account; and that the defendants, William Nottidge and Richard Black, with John Stride now deceased, as executors of Sir Thomas Maryon Wilson, filed a bill of revivor of such suit against the defendant Draper, and such suit was still pending.

That the plaintiff had examined the defendant Draper as a party in this cause upon interrogatories; and he found by his examination put in thereto that the defendant Draper stated that he did not, since the dissolution of the partnership, settle and adjust any account with Sir Thomas Maryon Wilson deceased, nor did Sir Thomas Maryon Wilson ever adjust or agree with the examinant upon any account or accounts in which credit or credits was or were given to him for any sums of money as having been paid to the examinant expressly for or on account of any bill of costs, or for moneys retained by the examinant expressly for or on account, or in satisfaction, or part satisfaction, of any bill of costs; nor did Sir Thomas Maryon Wilson, to the knowledge and belief of the examinant, ever debit the examinant with any sums of money expressly on account of any bill of costs. And the examinant stated that Sir Thomas Maryon Wilson did not ever in writing, or in any account in writing expressly allow to the examinant any sum or sums of money expressly in payment and satisfaction, or in part payment or satisfaction, of any account; and the examinant stated that his accounts with Sir Thomas Maryon Wilson had not been settled.

And the defendants, the executors, had also examined the defendant Draper as a party in this cause upon interrogatories; and by his examination he stated that he did receive from, and was paid by, Sir Thomas Maryon Wilson, Baronet, deceased, in the manner thereinafter mentioned, the whole amount of the bill of costs of the late partnership between the examinant and the plaintiff due from Sir Thomas Maryon Wilson at the time of the dissolution of the partnership. And the examinant stated that the bill of costs was paid, or he received the amount thereof at various times and by various sums of money, some of which sums were paid to the examinant by Sir Thomas Maryon Wilson, and others of them by moneys retained by the examinant by the direction, or with the permission, of Sir Thomas Maryon Wilson, out of moneys belonging to him which had been received by the examinant: and the examinant stated that, to the best of his recollection and belief, there was not any person present when such moneys, or any of them, where paid to the examinant, or when Sir Thomas Maryon Wilson directed or permitted the examinant to retain such moneys as the examinant did retain: and the examinant stated, that he had in the schedule to his examination underwritten set forth a true statment or account, to the best of his belief, of the moneys which the examinant so received from Sir Thomas Maryon Wilson or retained: but he did

not recollect or believe, that such moneys, or any part of them, were retained by the examinant expressly on account of such bill of costs; for when he had money in his hands, Sir Thomas Maryon Wilson told the examinant to retain what he wanted, as money would be of service to him (the examinant;) and the examinant stated, that he accordingly retained the moneys in the said schedule mentioned. That to the best of his belief there was not any money due from the estate of Sir Thomas Maryon Wilson deceased, on account of the bill of costs of the late partnership: and the examinant stated, that the said bill of costs was, in fact, paid and settled on the 10th of September 1820, when the sum of 282*l.* 17*s.* 5*d.* was retained by the examinant: and the examinant stated, that he did not recollect that any thing particular passed on the occasion; but it was of course understood by him, and he believed by Sir Thomas Maryon Wilson also, that credit was to be given by the examinant in his accounts with Sir Thomas Maryon Wilson for the sums so paid to and retained by the examinant, when the account should at a future time be settled between the examinant and Sir Thomas Maryon Wilson; and for that reason also, the examinant stated that he did not make or give, or was not required to make or give, any receipts or receipt for the moneys which were so paid to, or retained by, the examinant as aforesaid.

The cause now came on to be heard upon further directions.

Mr Treslove, and Mr Oliver Anderdon, for the plaintiff. The Master has found that there is a debt of 442*l.* due to the firm, and the Master's finding was correct. There is no pretence for saying that there was ever a payment of the partnership debt to one of the partners. Draper had no authority to apply the money received by him in his private character in discharge of the partnership debt; and if Wilson had brought an action against Draper as his receiver, the latter could not have insisted upon such an application, or have pleaded the partnership debt by way of set-off. Todd *v.* Reed, 4 B. & A. 210; will illustrate this view. In the case of Jeffs *v.* Wood, 2 P. W. 129; the then Master of the Rolls held that stoppage was no payment at law, nor was it of itself payment in equity.

Mr Pemberton, for the executors of Sir Thomas Wilson. The question is, whether, upon the evidence found by the Master, he ought not to have reported that the debt was satisfied? With respect to the evidence of Draper—

Mr O. Anderdon. He is not examined as a witness, but as a party.

Mr Pemberton. The accounts remained in the possession of Mr. Draper, for him to wind them up. Mr Pritchard did very little towards them. Mr P. asks, in a letter twelve months afterwards, will Sir Thomas Wilson settle the account? Mr Draper had been employed by Sir Thomas Wilson before the partnership, and continued to be so employed during the partnership. Had not Sir Thomas Wilson a right to treat Mr Draper as before? Mr Draper goes on receiving Sir Thomas Wilson's rents, and that Mr Pritchard considered that Sir Thomas Wilson had a right to pay Draper is to be concluded by that. Mr Pritchard actually gave Sir Thomas, in 1821, notice not to pay Draper. Up to that time these payments to him were not disputed; but now finding

Draper to be insolvent, he attempts to get all the partnership bills from Sir Thomas Wilson: the whole question between these parties might have been tried at law.

Mr Cooper (also for the executors, having handed in a receipt dated on the 7th October 1817,) the partnership was dissolved on the 17th October; and that document shows that 300*l.* was received during the partnership: it is signed "for Pritchard and Self, C. Draper." The court can never come to a conclusion that this money must be again paid. In 1821 Draper assigned to Pritchard the outstanding debts; and it was agreed that a list of them should be made out, but it never was made out: however, there is no doubt that if a payment is made to one of two partners, after notice from the other not to do so, that would be a payment in the parties' own wrong.

The Master of the Rolls.—Pritchard had a demand upon his partner, and that demand is satisfied by an assignment of debts, and a bond for 750*l.*, and to know that that would have been satisfaction of his demand upon his partner, he must have calculated what was due to him: it is impossible that the sum of 750*l.* could have been secured without reference to what was due.

Mr Cooper continued:—Before the Master I cited authorities that payment to one of two partners was a good payment, and I proved that all the demand had been paid before the notice of 1821, and that two payments had been made during the partnership; but the Master has reported against us. From the examination of Mr Draper it appears that the debt was satisfied in 1820.

Mr Treslove, in reply. The bill alleges that Draper refused to join in an action at law, and that is proved: at law we must have been non-suited. The receipt for 300*l.* was given on the 7th October 1817, but the defendant Wilson does not pretend to have receipts for the other sums. In October 1818, Pritchard says to Draper, "will Sir Thomas Wilson soon settle?" It was very proper to apply to him, he having been concerned for Sir Thomas Wilson; but the question remains, whether payments have been made. Draper in his examination, says that he never received any moneys specifically in payment of the partnership bills, but he received rents. To this hour we do not know the state of the account; and on our notice to Sir Thomas Wilson he immediately filed a bill against Draper for an account.

The Master of the Rolls.—If the case made by the bill had been established by the Master's report, there could have been no doubt that the finding of the Master would have been perfectly consistent with the law upon such cases; but it so happens that the case made by the Master's report is totally different from the case made upon the bill. In the bill it is stated, that after the dissolution of the partnership, and after an assignment by Draper to his partner Pritchard of all the partnership debts, and after notice to Sir Thomas Wilson of that assignment, he Sir Thomas Wilson paid to Draper the partnership debt. Now it appears that the payment insisted on upon the part of Sir Thomas Wilson, or rather upon the part of his executor, he being dead, was a payment due

after the dissolution of the partnership, but prior to the assignment made by Draper to Pritchard, and prior, consequently, to any notice of that assignment given to Sir Thomas Wilson. It is perfectly clear, after a dissolution of partnership, unless there be notice to the debtors of the partnership, that partnership debts are to be paid to a particular partner, payment by a debtor to any one partner is a good satisfaction of the partnership debt. If the debtor in the place of payment permits one of the partners—gives him authority to receive moneys which are due to him, the debtor, in the confidence that those moneys when received will (like payment by the debtor) be a satisfaction of the partnership debt, there can be no doubt that a retainer of those moneys by a partner receiving them is equivalent to actual payment by the debtor to the partnership. It must be assumed here, that Sir Thomas Wilson gave authority to Draper to receive moneys due to him, in the confidence that those moneys, when received, were to be considered as payments of the partnership debt. I am of opinion, therefore, that the Master has mistaken the law, that his report is incorrect, and can not be sustained.

Bill dismissed with costs up to the hearing, but no subsequent costs.

Reg. Lib. B. 1829. fol. 1269.

## Hodder *v.* Ruffin.

1 *Tamlyn*, 341.

A PURCHASER in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase money into court for the benefit of the parties to the suit.

*Westminster Hall*, January 29, 1830.

## Butter *v.* Ommanney.

1 *Tamlyn*, 344.

An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that in fact a good title could be made, and thereupon petitioned the court that the order might be discharged. The court discharged the order, giving the purchaser his costs, and referred it to the Master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry.

*Westminster Hall*, January 30, 1830.

MR. DIXON for the petitioner.

A freehold house had been sold in this cause to Alexander Snodgrass

for 545*l.*, and that sale had been confirmed absolutely. The petitioners are jointly interested with the plaintiffs and the other defendants in the amount of the purchase-money. On the 11th of December 1829, the plaintiffs' solicitors wrote a letter to the solicitors of the petitioners, with the copy of a petition to be heard at the Rolls on the Tuesday following, and desired them to give a consent brief to counsel; and that petition stated, that there was not a good legal covenant in a certain indenture dated the 5th day of June 1788, for the production of certain title-deeds, and which title-deeds, there was great reason to fear, were lost; and therefore it had been advised, that the purchaser could not be compelled to complete his purchase, and prayed that he might be discharged therefrom. In the confidence of this statement the consent requested was given, and an order made thereon. The petition now before the court stated information subsequently obtained, by which they had concluded that the title-deeds were not lost, and that even if they were, there was sufficient title, and prayed that the order might be discharged.

Mr K. Parker, for Sir Francis Ommanney.
Mr Phillimore, for other persons interested in the purchase-money.
Mr Rolfe, for the purchaser.
Mr Wray, for the plaintiff and for Messrs Horton and Son.

The Master of the Rolls. I can not hold these petitioners to a consent which was given on a representation that the title-deeds were lost. They certainly acted under the presumption that the title-deeds were lost. I must consider this case as if no consent had been given. The abstract was actually compared by Horton and Son with the deeds in the custody of Currie and Co. I must consider what would have been done upon the original petition had not a consent been produced. I could not have compelled them to consent. If I can not discharge the purchaser, must I not refer it to the Master generally to inquire whether a good title can be made? The purchaser must be indemnified in respect of costs, for no misrepresentation can be charged to him. The proper course will be, to direct a general reference whether a good title can be made. If it shall appear that there is not a good title, then the inference will be, that the present petition is unnecessary, and that will have its influence in deciding on the costs of the reference. All I can now do will be to discharge the order, and refer it to the Master to inquire whether a good title can be made, and when it was made.

Let the solicitor of the petitioner have the conduct of this inquiry before the Master; the purchaser to have his costs of this petition; the costs of other parties reserved. The purchaser to have leave to petition the court to be discharged from the purchase on the 13th of February, and the order not to be drawn up until after that day.

## Collisam *v.* Sams.

1 *Tamlyn*, 346.

A testator having directed his executors to pay the interest of his residue to a woman during her life, and after her decease to divide the residue amongst the next of kin:
Held, the next of kin at the time of testator's death were the persons entitled.
*Westminster Hall*, February 1, 1830.

BY the will of the testator the executors were to invest the residue, "upon trust to permit Hannah Fowler from time to time, during her natural life, to receive the interest thereof; and after her decease upon trust to divide the same unto and amongst the next of kin, in a due course of administration."

Mr S. Girdlestone. The question is, whether, after the death of Hannah Fowler, the next of kin meant were those living at the death of the testator or the death of Hannah Fowler? I believe, in fact, it must be taken to mean the persons who filled the character of next of kin at the time of the death of the testator.

The MASTER OF THE ROLLS decided, that the next of kin meant were those at the time of the testator's death.
Reg. Lib. A. 1829. fol. 610.

## Arnold *v.* Congreve and others.

1 *Tamlyn*, 347.

A testatrix directs that the interest of 6000*l.* shall be paid to her son during his life, and at his death one half of the stock to go to the son's *eldest male child living at the death of the testatrix;* the other 3000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without *leaving* issue, then she gave the 6000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain.
By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their children:
Held, that in respect to the gift to the *eldest male child* of the son "*living at my death*," the limitation over by the codicil of the 3000*l.* given to him by the will, is within the rules of law:
Held, that the gift of the 3000*l.* to *the other children* of the testatrix's son, being general, extended to all the children he might *have, either before* or *after her death;* and that the limitation over by the codicil to their children was therefore void.
*Westminster Hall*, Feb. 4, 1830.

THE testatrix, Susannah Olivier, by her will bequeathed as follows:—"I leave and bequeath 1200*l.*, 3 per cents. reduced annuities, which

[Arnold *v.* Congreve.]

I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner: One half, or 6000*l.* of the said trust, the interest thereof shall be for the use of my son Rev. Daniel Stephen Olivier during his life, and shall be duly paid unto him as his property, and at his death, one half, which shall be 3000*l.* said stock, shall revert to his my said son's *eldest male child living at my demise*, and the other half, or 3000*l.* said stock, 3 per cent. reduced, shall be divided in equal shares *between his other children lawfully begotten;* but should my said son die without leaving issue, in that case the whole of his moiety or 6000*l.*, 3 per cent. reduced stock, shall revert in equal shares between my other two children during their lives, and at their death it shall revert to their issue; or should either of them die without leaving issue, it shall in that case revert in equal parts to those of my grandchildren that shall then remain. The other moiety, or 6000*l.* of the said 12,000*l.*, 3 per cent. reduced stock in trust, shall be divided in equal shares between my two daughters, Julia Elizabeth Eyre, and Mary Esther Conybeare, the interest of which shall be duly paid them during their lives, and at their death each one's share shall revert to their children; but should either of my daughters die without leaving issue, in that case their share of the said trust, which will be 3000*l.* 3 per cent. reduced, shall revert in equal shares between my surviving children; and at their death revert to my surviving grandchildren in equal shares."

In one of the continuations of the will the following is contained:

"My three children, or their issue if they are dead, are to be joint residuary legatees, and are to share equally in all the residue of my fortune that is not otherwise bequeathed or disposed of."

And another clause is as follows:

"I also leave and order to be put in trust by my executors 10,000*l.* bank stock, which now stands in my name, the interest of which shall be duly paid in equal shares to each of my said three children during their lives, and at her death, each one's share or third of the said 10,000*l.* bank stock shall revert in equal shares between their *issue;* but should either of my children die without *leaving issue*, in that case their share or third of the said bank stock shall revert to the remainder of my said children, and at their death to revert to their issue, or whatever issue shall remain from either of my said children, in equal shares."

And another clause is as follows:

"All lapsed legacies are to return to the bulk of my fortune excepting those that are entailed, and the 700*l.* 3 per cent. consols that I leave to Mrs Passmer, which reverts to my son the Rev. Daniel Stephen Olivier, after her death, at his own disposal, neither shall any unentailed legacy return to the bulk (that I leave to either of my children in case they have any issue): and all the legacies I leave to my grandchildren shall revert to their brothers and sisters if they die minors, or if such legacies are not entailed; and even should they die in my lifetime, their shares shall equally revert from the time this will is written."

The testatrix appointed Dr. William Conybeare, Sir Joshua Vanneck, and the Rev. Daniel Stephen Olivier, executors of her will.

The testatrix made a codicil to her will, dated 30th March 1801, in in which is contained the following clause:—

"I now furthermore request that at the death of each one of my chil-

dren who have any issue, that the 10,000*l.* Bank stock, and also the 12,000*l.* 3 per cent. reduced, which by my will I have entailed upon my grandchildren, I would also have these my remaining grandchildren's said share of the same two stocks be also settled upon them to enjoy the interest thereof during their lives, and afterwards to revert to their children lawfully begotten; but in default of any issue, they may dispose of it as they think proper.

The testatrix in another codicil named the plaintiff an executor, instead of the Rev. Daniel Stephen Olivier.

The testatrix died in January 1823, leaving her son Daniel Stephen Olivier, since dead, and her daughters Margaret Esther Conybeare, since deceased, and Julia Elizabeth Eyre, the widow of Sir William Congreve, Bart., her only children her surviving.

Daniel Stephen Olivier died in December 1826: he had seven children, viz. two who died in the lifetime of the testatrix, Harriet Elizabeth, who attained twenty-one, but died unmarried and intestate in the lifetime of her father, but after the death of the testatrix, and two sons and two daughters, defendants to this suit. One of those sons, Daniel Josias Olivier, attained twenty-one, and had eight children, two of whom died infants and intestate, and the others were defendants to the suit, and all born after the death of the testatrix.

Anna Awdry Etough, another of the daughters of Daniel Stephen Olivier, attained twenty-one, had nine children, defendants to this suit, and they were also born after the death of the testatrix.

Henry Stephen Olivier, another son of D. Stephen Olivier, attained twenty-one, had three children all born after the death of the testatrix, and defendants to this suit.

Mary Arnold Olivier, the other daughter of Daniel Stephen Olivier, attained twenty one, and is unmarried.

Lady Congreve is a widow without children. Mrs Conybeare died leaving two children, who survived the testatrix, one of whom a defendant to this suit, has had seven children, who are also defendants to this suit; but the other, after attaining the age of twenty-one years, died and his widow is his personal representative.

The bill prayed that the rights of all parties might be ascertained.

Harriet Elizabeth Olivier, the daughter of Daniel Stephen Olivier, who was born on the 18th of December 1791, died in August 1818, a spinster and unmarried; and upon her death, the defendant Daniel Josias Olivier took out letters of administration: and the Master found, that D. Josias Olivier received a letter which had been produced to him, properly verified, from his father the said D. S. Olivier, shortly after the death of the said Harriet Elizabeth Olivier, in the words and figures, or to the purport and effect following: (that is to say,) "My dear son,—Your sister's dear remains I have seen carrying into the room prepared for that purpose. In opening Henry's letter to add a few words, I saw that yours (upon glancing that way) was merely a continuation of the same melancholy subject. I think you tell him your sister expressed a wish, as far as you could understand her, that you should take some of her money; take it all, for God's sake, if you choose, my dear son; only let her just and lawful debts be paid, and peace to her remains. D. S. O.—My doors, as you well know, would always have been open to your sister, whom I loved whilst

living, and shall most readily comply with her last wishes, and wish to see them performed. Pray direct the Squire's letter, as I have mislaid the direction you left."

And he found, that in consequence of such letter, the said Daniel Josias Olivier took out administration to the effects of the said Harriet Elizabeth Olivier, and possessed himself thereof, and afterwards divided the same between his brother Henry Stephen Olivier and his two sisters Mary Arnold and Anna Awdry Etough, jointly with himself, the said Daniel Josias Olivier, in equal proportions.

And he found that the said Daniel S. Olivier approved of such division, as appears by a memorandum signed by him, and dated the 8th of February 1819, which had been produced to him the said Master, which is in the words and figures following: (that is to say,)

"*Clifton*, 8th February 1819.

"I the Rev. Daniel Stephen Olivier, clerk, of Clifton, Bedfordshire, having waived all claim to the property of which my late daughter Harriet Elizabeth Olivier died possessed in favour of my son Daniel Josias Olivier, clerk, do hereby approve of his dividing the same in equal shares with his brother Henry Stephen Olivier, his sister Mary Arnold Olivier, and his sister Anna Awdry Etough.*

"D. S. Olivier."

Mr Bickersteth, for the plaintiff.

Mr Tinney for Daniel Josias Olivier, the eldest son of Daniel Stephen Olivier.

He claims to be entitled to 3000*l.*, half of 6000*l.*: he claims it absolutely. The codicil being so expressed as to have given him, if it had been real property, an *estate*-tail, and consequently, the absolute interest in it, as being personal. There are many cases in support of this construction, founded upon Wylde's case in 6 Co. 16.† In the codicil also the limitation is to the children of her grandchildren generally, which not being confirmed to those living at her death, may include, therefore not only those grandchildren born at the time of the death of the testatrix, but also any others afterwards born until the death of their parent; and the fund being divisible, it must be held, therefore, a gift to unborn grandchildren for life, and then to their issue; and such a limitation would be void as too remote, and rejected, though all the grandchildren as here were actually born, and *in esse* in the lifetime of the testatrix, Leake *v.* Robinson, 2 Mer. 363. This includes the shares of all the grandchildren, and, of course, that of Daniel Josias Olivier.

The Master of the Rolls. The testatrix by her will gives to the

* On the effect of these letters there was much discussion: the result will be seen in the decree.

† Hodges *v.* Middleton, Doug. 485. 431. 2 edit. Seale *v.* Barter, 2 B. & P. 485. Robinson *v.* Robinson, 1 Burr. 38. Tothill *v.* Pitt, 1 Mad. 488. Murthwaite *v.* Jenkinson, 2 B. & C. 358., and 3 B. & C. 191. Jesson *v.* Wright, 2 Bligh, 1. Wooler *v.* Andrews, 2 Bing. 126. Hughes *v.* Sayer, 1 P. W. 534.

*eldest male child of her son living at her death;* and then the codicil limits the share of the eldest male child, as being one of the grandchildren, to a life-interest, with remainder to his children. It is nothing that with respect to the other grandchildren it might be void; it can not be too remote as to such eldest son. The codicil must be so far construed, *reddendo singula singulis.*

Mr Tinney resumed.

But with regard to the other grandchildren, they must take absolutely, and one of them was Harriet, who died without issue and intestate; and Daniel Josias Olivier, as having taken out the administration, is therefore entitled to receive her share; and two of his own children being now dead, he will be also entitled to their respective shares as their administrator and next of kin.

Mr W. O. Carr, followed on the same side.

The 3000*l.* only was given to Daniel Josias Olivier as the eldest male child living at the testatrix's death. He did not take his share in the 10,000*l.* as such *persona designata* at her death, but under the general description or class of grandchildren. He was entitled, therefore, absolutely to the latter, on the codicil being so far held void for remoteness. But the true effect of the codicil is to give Mr Daniel Josias Olivier a *quasi estate-tail,* and therefore an absolute interest in both funds or shares.

The Master of the Rolls. How is it possible that the testatrix gives him an absolute interest in the 3000*l.* when by the will she gives it to him absolutely, and by her codicil she states she limits the absolute interest so given by her will to a life-interest only. I must construe the will and codicil together.

Mr W. O. Carr, resumed.

In the case of Seale *v.* Barter the court decided the construction on the codicil alone. It is not a question of *intention* that governs the cases cited in support of this construction. To use the words of Lord Hale in giving judgment in the case of the King *v.* Melling, Ventr. 214, 225,—"It is impossible that he did intend but an estate for life, and it is by consequence and operation of law only that it becomes an estate-tail." The intention drawn from the will and codicil being taken together can but amount to an *express* declaration upon the codicil that he should take "for life and *no longer*; which would make it similar to Robinson *v.* Robinson; and notwithstanding which the court there held that an estate-tail was given. And the rule is the same in equity as at law, that however express or clear the interest be intended and limited for life, it will be enlarged by this necessary legal construction, or effect of such subsequent limitations. Chandless *v.* Price, 3 Ves 99, Mortimer *v.* West.*

But should the court decide upon the *intention,* the true construction must still be to give him a *quasi estate-tail,* and, therefore, an absolute interest in both funds or shares. For the courts have at least always endeavoured to carry into effect the *general* intent, though they sacrifice

* Since reported, 2 Simon, 280.

by so doing the *particular* intent. Robinson *v.* Robinson. The general intent here is to secure the grandchildren and their respective issue the shares bequeathed to their parents; and the particular intent in limiting life-estates by the codicil was only in furtherance of this. The limitations over, then, being void as too remote (except as to the 3000*l.* given to my client as the eldest son,) the grandchildren would take only for life under the codicil, and the respective shares might go to the residuary legatees as undisposed of. By construing, however, the effect of the codicil to give a *quasi* estate-tail, this general intent is preserved. If it be contended that the codicil is executory, and therefore enables the court to carry the legal intention of the testatrix into effect, as in Humberston *v.* Humberston, 1 P. W. 332; the court, in these cases, adopts or acts upon the doctrine of *cy. pres.*, Mortimer *v.* West, 2 Sim. 280; which is inapplicable to personalty. Fearne, 8th ed. 208. Routledge *v.* Dorrill, 2 Ves. 357; Leake *v.* Robinson, 2 Mer. 363.

Mr Pemberton for Mrs Anna Awdry Etough, a grand daughter.

It is clear that although you may limit to unborn children, you can not limit upon that. The question is, whether the codicil is not intended to effect such latter limitation, and therefore void for remoteness? Except the 3000*l.* given to the eldest male child of the son of the testatrix living at her decease, the other bequests are to the grandchildren generally, under which description or class may be included not only those *in esse* at the time of the testatrix's death, but any born after during their parent's life; and though in this case all the grandchildren were actually born during the testatrix's life, and therefore the limitations over by the codicil to their children, if properly expressed, might have been good, yet in as much, as the limitation stands, it might extend to a limitation over to the children of grandchildren unborn in the testatrix's life, it must be void altogether: it can not be held good as to part, and void as to the rest. Leake *v.* Robinson.

This being so, the limitations in the codicil are void except as to the 3000*l.* given to the eldest male child of her son living at her death; and as the sole intention of the testatrix, in limiting by her codicil the absolute interests given by her will to the grandchildren to life-interests was but for the purpose of further securing to them and their respective issue the full benefit of their respective shares, and the object so intended can not be legally affected, but is void for remoteness, the court must so far reject the codicil *entirely*, and the grandchildren must take, therefore, absolute interests in their respective shares under the will as if the codicil had never existed, or at least affected their interests. With respect to the 10,000*l.* there is this further question, whether "issue" extends to more remote issue than the grandchildren, so as to include their children with them in the bequest? I contend that it goes here no further than grandchildren, and then my client will take an absolute interest in her share of the 10,000*l.* also.

Mr Skirrow followed.

Mr Treslove and Mr John Boteler, for two others of the children of Daniel Stephen Olivier, supported Mr Pemberton's argument.

Mr Sidebottom and Mr Elderton, for some of the children of grandchildren.

[Arnold *v.* Congreve.]

All the children being *in esse* at the time of the testatrix's death, the limitation over to their children by the codicil must be good, though in the limitation the grandchildren are not expressly confined to those *in esse* at the testatrix's death. The case of Leake *v.* Robinson is not in point, as there the testator attempted to limit to his unborn grandchildren, and also to postpone the vesting till *twenty-five*. The courts have never yet decided to restrain these powers of limitation as far as is now contended for, and have already gone far enough.

Mr Teed, for the children of Daniel Josias Olivier, urged similar arguments.

Mr West, Mr Roupell, Mr Lowndes, and Mr Warry, for other children.

The Master of the Rolls.—The law is perfectly well settled: there is no difference with respect to a limitation of freehold and personalty. You can not limit an estate after an estate limited to unborn children, which this testatrix has endeavoured to do. The question with respect to the two sums of 3000*l.* and 3000*l.* is, has the testatrix confined her words to grandchildren born at the time of her death? The words she has used are these:—"I leave and bequeath 12,000*l.* 3 per cent. reduced annuities, which I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner:—one half or 6000*l.* of the said trust, the interest thereof shall be for the use of my son the Rev. Daniel Stephen Olivier during his life, and shall be duly paid unto him as his property; and at his death one half, which will be 3000*l.* stock, shall revert to my said son's eldest male child living at my demise."

As to the 3000*l.* given to Daniel Josias Olivier as her "son's eldest male child living at my demise," the subsequent limitation in the codicil to him for life, and then to his unborn children, is within the rules of law, and not being void for remoteness, I shall hold it valid. Then, as to the other children, the will says, "the other 3000*l.* stock shall be divided in equal shares between his other children lawfully begotten." Do not these words include every other grandchild that could be afterwards begotten? There can be no doubt upon it.

She afterwards made a codicil, by which she desires to limit the interest of her grandchildren to a life-estate. Now, having already stated that the limitation to the grandchildren includes not only those *in esse* at her death, but every other grandchild afterwards begotten, any limitation to their children must be not within the rules of law, but void for remoteness.

It has been suggested very ingenuously by Mr Pemberton, that as the codicil, with respect to the grandchildren being the children of the sons and daughters of Daniel Stephen Olivier (other than the eldest son in respect of one of the sums of 3000*l.*), had failed by reason of its giving an interest too remote, that the will, with that exception, is not affected by the codicil, and, consequently, that their interest rests upon the construction of the will only. And I am disposed to think that there is a clear intention that the codicil was only made to let in the great grandchildren; and as that fails, the intention of the testatrix will be best ef-

fected by declaring, that the interest given to those grandchildren by the will is not displaced by the codicil, and, consequently, that they took an absolute interest.

The minutes of the decree are as follows:

Declare that, according to the true construction of the will and codicils of Susannah Olivier, the testatrix, the defendant Daniel Josias Olivier, as the eldest male child of the testatrix's son the Rev. Daniel Stephen Olivier living at the testatrix's death, is entitled during his life, and from the death of his said father Daniel S. Olivier, to the dividends and interest of 3000*l.* bank 3 per cent. annuities, part of the 12,000*l.* like annuities in the will of the testatrix mentioned; and after his decease, any person interested in such one fourth part to be at liberty to apply. Declare, that as to the 10,000*l.* bank stock, and all other the legacies and bequest to the testatrix's grandchildren in the will and codicil contained, except as to the said 3000*l.* 3 per cent. reduced annuities, the limitation over to the issue of the testatrix's grandchildren contained in the codicil of the 30th of March 1801 is void for remoteness; and as to the 10,000*l.* bank stock, the defendant Daniel Josias Olivier, as one of the grandchildren of the testatrix, and the issue of her son Daniel S. Olivier, is absolutely entitled to a fifth of the third part of the 10,000*l.* bank stock. Declare, that Anna Awdry, the wife of the defendant Richard Etough, and the defendants Henry Stephen Olivier, and Mary Arnold Olivier, and Harriet Elizabeth Olivier deceased, as the four other children of Daniel Stephen Olivier, and as grandchildren of the testatrix, became absolutely entitled to the 3000*l.* bank 3 per cent. reduced annuities, further part of the 12,000*l.* like annuities, and to four fifths of the one third of the 10,000*l.* bank stock in equal shares. Declare, that the share and interest of Harriet Elizabeth Olivier is effectually passed by the gift of the said Daniel Stephen Olivier in his lifetime to the said Daniel Josias Olivier, in trust for himself and the defendant Henry Stephen Olivier, Mary Arnold Olivier, and Anna Awdry Etough. Declare, that the defendant William Daniel Conybeare, and the late John Josias Conybeare deceased, as the children of Margaret Esther Conybeare, and grandchildren of the testatrix, are entitled to one half part of the 6000*l.* bank 3 per cent. reduced annuities, being the residue of the 12,000*l.* like annuities, and to one other third part of the 10,000*l.* bank stock in equal shares. Declare, that the defendant Dame Julia Elizabeth Congreve, the daughter of the testatrix, is entitled during her life to the dividends and interest of the remaining 3000*l.* bank 3 per cent. annuities, and of the remaining third part of the 10,000*l.* bank stock. The dividends and interest from time to time to accrue due in respect of the last-mentioned annuities and bank stock to be from time to time paid to the defendant Dame Julia Elizabeth Congreve by half-yearly payments during her life; and after her decease, any persons interested therein to be at liberty to apply. The Master to be at liberty to state special circumstances, and any of the parties to be at liberty to apply.

Reg. Lib. A. 1829. fol. 1684.

**Between Peter Vawdrey and Dame Hannah Evans, plaintiffs; and Archibald Perrin Geddes, John Hyslop, John Arthur Borron, Mary Vawdrey, Gilbert Vawdrey, Richard Vawdrey, William Vawdrey, Thomas Vawdrey, Sarah Darell Vawdrey, and Peter Nicholson, defendants.**

1 *Tamlyn*, 361.

A testatrix by her will directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age, they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age leaving issue, such issue to be entitled to their respective parent's share, at such time as the parents would have been entitled thereto if living:

Held, that the gift to the children of the sisters was too remote.

*Westminster Hall*, Feb. 4, 1830.

THE testatrix, Amy Seaman, by her will, dated the 9th of January 1798, directed that all the produce of the residue of her estate and effects, after paying the legacies, her funeral expenses, and any debts which she might owe, should be placed out on mortgage or government security, and the interest, dividends, or produce thereof should be equally divided between her four sisters, for their sole and separate use, and independent of the control or authority of their husbands, during their natural lives; and on the death of her sisters, she declared that the interests of their respective shares should, at the discretion of their executrixes, be applied in the maintenance, education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, and upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age leaving lawful issue, such issue should be entitled to their respective parents's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the mean time; but in case any such children should die under the said age without leaving issue, or such issue should die before they were entitled to the principal of their shares, that then the other children of her said sisters should be entitled thereto, together with the issue of any of them who should be then dead, in like manner, and with like benefit of survivorship, as their original shares; but in case all the children of any of her said sisters should die without issue, or there being such issue, they should all die before the principal of their respective shares should become payable, then the share of such of her sisters, whose children should so die, should be paid and applied to and for the benefit of her other sisters and their respective children or issue, in like manner as their original shares; and upon the decease of her sister,

Hannah Evans, leaving no issue, she willed that her brother-in-law, William David Evans, should have the interest and produce of her share, during his natural life; and that upon his decease, the same should be applied to and for the benefit of her other sisters and their children, in like manner, and with like power of survivorship, as the shares of her other sisters were.

The testatrix died on the 27th of August 1798, leaving her sisters, Elizabeth, the wife of James Nicholson (since deceased,) Mary, the wife of Daniel Vawdrey, who was then living, Catherine Perrin, widow, since deceased, and Dame Hannah Evans, then the wife of, and now the widow of, Sir William David Evans, and who is now living, her only next of kin her surviving, the four sisters of the testatrix mentioned in her will.

Elizabeth Nicholson, one of the textatrix's sisters, died on the 2d February 1810, leaving one child only, the defendant, Peter Nicholson, who attained the age of twenty-two years, and procured letters of administration of the effects of his mother, and he thereby became her legal personal representative.

Catherine Perrin, another of the testatrix's sisters, died on the 5th of February 1803, leaving one child only, Sarah, the wife of William Geddes, who died on the 5th of July 1803, of the age of nineteen years, leaving only one child, the defendant, A. P. Geddes, who attained the age of twenty-two years; and he having procured letters of administration to the effects of his mother to be granted to him, he thereby became the legal personal representative of the said Sarah Geddes.

Catherine Perrin, by her will, dated 16th May 1802, appointed William David Evans and Thomas Lyon her executors, both of whom proved the same, and thereby became her legal personal representatives. W. D. Evans survived T. Lyon, and died in December 1821, having by his will appointed the plaintiffs, Peter Vawdrey and Dame Hannah Evans, his executor and executrix, who duly proved the same, and thereby became the legal personal representatives of the said Catherine Perrin.

The defendant, Mary Vawdrey, had six children, who are all living; namely, the defendant, Gilbert Vawdrey, then in the fiftieth year of his age; the plaintiff, Peter Vawdrey, then in the forty-ninth year of his age; the defendants, Richard Vawdrey, then in the forty-seventh year of his age; William Vawdrey, then in the forty-fifth year of his age; Thomas Vawdrey, then in the forty-third year of his age; and Sarah Darell Vawdrey, then in the fortieth year of her age. The defendant, Mary Vawdrey, never had any other children or child.

Dame Hannah Evans never had any children or child.

The Master reported that he could find no other next of kin.

Mr Duckworth for the plaintiff.

Mr Bickersteth and Mr Koe for defendant, Archibald Perrin Geddes, cited Leake *v.* Robinson, 2 Mer. 363; and Bull *v.* Pritchard, 1 Russ. 213.

Mr Pemberton and Mr Simpkinson for the executors of William Geddes, as the representative of Sarah Geddes. The bequest over after the gift to the issue, after the gift to the children of the sister of

the testatrix, is clearly void, and is admitted so to be on all sides. But we say that the gift to the children themselves is absolutely vested, Hanson v. Graham, 6 Ves. 239; subject only to be divested on their dying under twenty-two, which is a void limitation, and can not therefore divest the estates.

In the case of Booth v. Booth, 4 Ves. 399, there was a gift of the residue to trustees who were to pay interest to two grand nieces till their respective marriages, and then to transfer to them their respective shares. One died unmarried; but the court held that her share had vested in her, and belonged to her executors.

Mr Temple for Mr Nicholson. The difficulties of this case may be avoided by holding that the gift is only to such children as were in existence at the time of the testatrix's death; for in that case it would not be contrary to any rule of law that the vesting of the principal be postponed until they arrive at the age of twenty-two, or to any other time during their lives. The difficulties would also be avoided by holding that all the children took vested interests, subjected by the will to be divested by their not attaining twenty-two; which condition could not have any operation, not being confined to children then in existence, so that the children would take an absolute interest.

The Master of the Rolls. This is a bill filed to take the opinion of the court on the construction of the will of Amy Seaman. The testatrix has directed the residue of her estate to be invested, and the interest to be divided between her four sisters during their natural lives; and on the death of her sisters, she has declared that the interest of their respective shares should be applied in the maintenance, and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years; and upon any of them attaining that age they should become entitled to their mother's share of the principal; and in case of the decease of any of them under that age, leaving issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto.

The testatrix gives for life to the four sisters: two of them are dead; and the question is, what is to be done with their shares? One of them left a daughter, who married Geddes, but died under twenty-two, leaving an only child, who has attained twenty-two. The other sister, Mrs Nicholson, left a son, Peter, who has attained twenty-two. The share of his mother was for some time treated as his; but a doubt having arisen, whether the limitation was not too remote, an opinion was taken, and this suit was instituted.

The authorities cited are extremely nice, and show the difficulties of this case, particularly in distinguishing this case from the case of Booth v. Booth, 4 Ves. 399, before Lord Alvanley; but it can hardly be distinguished from the case of Leake v. Robinson, 2 Mer. 363; (his honour here read the residuary clause of the will in that case;) the time of payment there was to be at the age of twenty-five or marriage. Now this, like the present case, was a residuary bequest; and in Booth v. Booth, Lord Alvanley, though not perhaps satisfactorily, thought the court should construe a residuary gift more favourably than a general

legacy to make the share vest, in order to prevent an intestacy. That distinction would be in favour of this case. The interest is to be applied to the maintenance of the children until they attain twenty-two, and then they are to be entitled to the principal. There can be no difference whether the age is twenty-two or twenty-five. In Leake *v.* Robinson the share was to vest at twenty-five or marriage; in this case at twenty-two only. This case may therefore be said to run on all fours with that of Leake *v.* Robinson. It has been argued that this was vested because maintenance was given; but it has never been held vested where it was given over if the legatee did not attain a certain age. Here the testator has directed that if a child die before he attains twenty-two years, his share shall go over; that repels all presumption of vesting, because simply maintenance is given. There is a different rule with respect to freehold, as in Boraston's case, 3 Co. 19; Doe *v.* Lea, 3 T. R. 41, and the cases which followed it. But in no case has personal property been held to vest, notwithstanding interest is given to the legatee, where the legacy is given over, and where a certain age is to be attained. On the part of Nicholson, the grandson, it was said by counsel that the words applied to children living at the death of the testator; but that can not be.

With respect to what has been said about accumulations, the act on that subject was passed in the fortieth year of the late king; and this will having been made in 1798, the act does not apply.

My opinion being that the gifts to the children of the sisters are void, as too remote, the subsequent gifts are also too remote, and the shares as they drop in, belong to the next of kin.

The costs to come out of the residue.

See Gilbert on Uses, p. 261., Mr Sugden's note. Proctor *v.* Bishop of Bath and Wells, 2 H. B. 358. Cambridge *v.* Rous, 8 Ves. 12. Lade *v.* Holford, 3 Burr. 1416. Blandford *v.* Thackerell, 2 Ves. jun. 238. Taylor *v.* Biddall, 2 Mod. 289. Stephens *v.* Stephens, Forrester, Cases temp. Talbot, 228.

## Between Thomas Baker and Ann his wife, late Ann Crease, widow, plaintiffs; and William Bent, defendant.

1 *Tamlyn*, 368.

A person having a reversionary interest expectant upon the death of R. *without issue*, sells the same. Many years after, a bill is filed to set aside the sale, on the ground of inadequacy of consideration:

Held, that the court will not enter into the value of property on such a contingency.

But it appearing that the treaty was entered into on a basis of considering the contingency to be half the value of the reversion, the court directed an inquiry of the real value without reference to the contingency, and directed that that contingency should be rated at one half the value.

*Westminster Hall*, Feb. 8, 1830.

THE plaintiff, Ann Crease, then the wife of Walsingham Crease, being under the will of James Finlayson seised of four equal undivided

eleventh parts of a wharf and two houses in Cannon Row in Westminster, in the occupation of the defendant or his under-tenant, in reversion expectant upon the death of James Roby, without issue male, agreed to sell the same to the defendant for 275*l.*

James Roby was then about sixty-four or sixty-five years of age, and had not any male issue, and was not married.

In April 1818, the plaintiff Ann Crease, and her then husband, by lease, release, and fine, conveyed this property to the defendant.

James Roby died on the 11th of September 1822, without issue.

The bill stated, that the annual value of the four elevenths was at the time of the purchase, and then was, 157*l.*; and that the defendant actually paid that rent for four other eleven parts or shares of the same premises, which he held as tenant to a Mrs Fearnall, the owner thereof.

The bill charged, that the plaintiff and her husband were, at the time of the sale, in poverty and distress, and that the defendant was acquainted with it. And also charged that the consideration was grossly inadequate; and the bill prayed, that the agreement and conveyance might be declared fraudulent and void, and be delivered up to be cancelled.

The defendant, by his answer, set forth a letter from Mr and Mrs Crease's solicitor, desiring to know, whether he would be disposed to treat for the purchase of the reversionary interest on having a clear title; that the parties were determined to endeavour to effect a sale, but previously to a public sale they wished the defendant to have the option of refusal.

After some time a price was named on behalf of the vendors at 1200*l.*, for *the reversion after the death of the present tenant for life.*

The defendant's solicitor offered 550*l.*; but on the delivery of the abstract of title, it was found that the vendors had not an absolute reversion expectant on the death of James Roby, but a contingent reversion expectant not only upon his death, but on his dying without issue, and on Elizabeth Roby dying without issue. She was then fifty-eight, and had never been married. She died in 1821. James Roby died in 1822. The defendant ultimately offered 275*l.*, which was accepted.

The defendant admitted, that as tenant to the trustees of Mr Fearnall of four other eleven parts or shares of the same premises, he paid them the annual rent or sum of 152*l.* 15*s.*; but defendant believed that no new tenant for the entirety of the premises would give 420*l.* 1*s.* 3*d.*, being after the same rate as defendant so paid to the trustees of Mrs Fearnall for their four elevenths.

No replication having been filed, this cause came on to be heard on bill and answer.

The effect of the evidence is stated in his honour's judgment.

The value of the reversionary interest estimated by Mr Morgan, supposing the rent to be 420*l.*, was 2592*l.*; but in this the contingency of issue was not taken into computation, and he would not take upon himself to say what deductions should be made on that account.

The evidence of the defendant by two surveyors was, that from 270*l.* to 300*l.* was the value of the four elevenths, under all the circumstances of the contingency.

Mr Pemberton for the plaintiffs. This bill is filed to set aside a sale of land, that interest being reversionary. The plaintiff Anne, in the

year 1816, was the wife of Walsingham Crease, an attorney's clerk, and he was living in a garret.

The plaintiff Mrs Baker, then Mrs Crease, was entitled to four elevenths in reversion of James Roby, and the interest was liable to be reduced by him or Elizabeth Roby having issue: he was sixty-three, and she was fifty-eight. The first point is as to the value; and if the purchaser of a reversion fails to show that he has paid the full value, the court will set the sale aside: this was decided by Sir William Grant, and has been recently acted upon by your honour.* There was also misrepresentation; for it being held at half the yearly rent it was worth, Mr Bent even represented that rent to be less then it actually was. I shall prove, that though he represented the rent to be 70*l.* for these four elevenths, he paid 85*l.*; and it is in proof that he paid for another four elevenths 157*l.* rent.

Immediately after the existing contract was determined by the death of the tenant for life, the rent was raised to 157*l.*

I will first called the attention of the court to the evidence of Mr Morgan; and the court will see it is clear that the plaintiff did not receive one third part of the value of the property sold.

He values at 2592*l.*, the entirety at a rent of 420*l.*; but he did not take into consideration the contingencies. Now the defendant in his answer says, that the value of the contingencies is one half; and the court will then deduct one half, and the remainder will be about 1300*l.* But let the rent be taken at 210*l.* only, instead of 420*l.*, there would then be a remainder of 700*l.*

The witnesses on the part of the defendant do not give the least notion of the grounds on which they make their valuation.

Under these circumstances, it is shown that a purchase has been made by the defendant at a price much under the value; it is clear that he purchased by misrepresentation. Admitting there was no knowledge in the defendant of the distressed circumstances, it is perfectly clear that the defendant has not given the value of the four eleven parts, the contingencies of one of sixty-three and the other of fifty-nine having issue amount to nothing. It is incumbent upon the purchaser of a reversion, even without any fraud, to show that he has given the full price: this is the doctrine of the court.

Mr Moore followed, also for the plaintiffs.
Mr Bickersteth and Mr Beames, for the defendant.

There never was a case more free from fraud and surprise: the vendors went to the defendant; and so far was he from being anxious to purchase the property, that he refused so to do. They then employed their solicitor, Mr Baker, who entered into a treaty with the solicitor of Mr Bent. There is no evidence of Mr Bent being acquainted with any distress, except that Mr Baker once said his clients were poor. It was in treaty and negotiation from 1816 to 1818; fraud and surprise are therefore out of the question. The real rent had been previously communicated to the plaintiff; 70*l.* was considered a permanent rent.

(In answer to a question put by his honour, he was informed that

* And see Hilliard *v.* Gambel, *infra*, note.

the answer to a bill filed by Mr and Mrs Crease against the executor of the person under whose will they took the property, and in which the actual rent appeared to be 85*l.*, was filed in 1814.)

Mr Bickersteth. There is nothing like misrepresentation; and the bill must be dismissed with costs.

Mr Pemberton cited a case, where a reference had been made to the Master, who reported a value of 600*l.* deducting 115*l.* for the contingency of issue. It was argued here and before the Chancellor.

The Master of the Rolls. I have no recollection of it. Can the plaintiff establish, that the calculations proceeded upon a less rent then they ought to have done? One man at sixty-three may marry in a year; another man, with other dispositions, might not do so. How is it possible to make any computation of the value of such contingencies?

Mr Pemberton, in reply.

I have already stated a case which was argued before your honour when Vice-Chancellor: the contingency was the death of a person of the name of Newton, without issue male. He was married. [Master of the Rolls. What age was his wife?] That did not appear. In that case a reference was made to the Master to report the value, and the Lord Chancellor confirmed your honour's decree; but it does appear to me that the court is not embarrassed with that difficulty. We have here Mr Bent dealing for this, and he well knew Mr Roby. He had illegitimate issue; and therefore there was the less chance of his marrying. Mr Bent offered to become the purchaser, allowing one half for the contingency: this is according to his own statement. Therefore take the value, and deduct one half for the value of the contingency; and yet we find that he has not paid more than one third of the value of the property: then the actual rent was not half the value. It is sufficient for me to show that the treaty proceeded on a mistake. It is said we knew the value; but in the sale of a reversion it is for the purchaser to make out that he has given the full value: that was decided by Sir William Grant. This is a reversion purchased at less than the value, and therefore the purchase can not stand.

The Master of the Rolls. Had this case turned upon the question whether a proper value had been given for a contingency, I should have dismissed it with costs; for how can a value be put upon the contingency of a man's marrying and leaving issue? But if a treaty proceeded upon a notion that the annual value is less than it really is, it would be plain that less than the value was given. Was the calculation in this case made upon a less rent than was actually paid? Now the calculation here was made upon an annual rental of 70*l.*; and Mr Nelson, the defendants solicitor, in his letter so stated it: whereas the truth is, it appears, that the rent was 80*l.* 10*s.* There is reason to suppose that the calculation did not proceed upon the real value. In 1822, on the death of the tenant for life, a lease was granted at 420*l.*, which for the four elevenths was 152*l.* per annum. It is then said, that this price was given for the local advantages; but I concur with

Mr Pemberton, that it is incumbent on the defendant to prove the value. This has been long acted upon.

I am therefore disposed to send an inquiry to the Master, what was the value in 1817, when the contract was entered into? But how can you value the contingency? It appears, as has been stated by Mr Pemberton, that these parties have considered this contingency as of the value of one half of the property, and concluded the treaty on that basis. Misrepresentation is not charged in the bill. Upon the whole, I think the justice of this case will be best answered by directing an inquiry what was the actual value of the reversion of four elevenths of that property at the time of the treaty, without respect to the contingency.

This certainly is not a case to be favoured; for it is not until 1828 that the bill is filed. If the price given shall appear to be not one half of the value at the time I shall declare the purchase void, but without costs. I can not give costs; the tenant for life having lived five years after the agreement, and six years having elapsed from his death until the bill was filed.

Declare, as between these parties, this contingency is to be considered as of the value of one half of the reversion.

Let an inquiry be directed what was the value of the reversion at the time of the agreement, without reference to the contingencies.

No costs given up to the hearing.

Reserve further directions and costs.

Reg. Lib. A. 1829. fol. 2385.

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## HILLIARD *v.* GAMBEL.

July 22, 1829.—Reg. Lib. A. 1828. fol. 2657.

This was a bill filed in 1826, to make void a sale of a reversion made in 1805; it was proved that the price was inadequate. It was held, that in a suit to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient, by the decided cases, to authorize the court to make void the sale and treat the purchaser of a reversion only as a mortgagee: that is, that the vendor, paying the purchaser his principal, interest, and costs, is entitled to a reconveyance.

## M'Nab *v.* Mensal.

1 *Tamlyn*, 375.

IN this case Mr Bagshawe, the counsel for a subsequent incumbrancer, asked to be dismissed, being satisfied she would never get any thing, and undertaking to join in any conveyance she might be called upon to execute.

The MASTER OF THE ROLLS said that she ought to have disclaimed on her answer. She must remain a party.

February 11, 1830.

## Dover *v.* Everard.

1 *Tamlyn*, 376.

A person appointed with another executor, and who disclaims; but who does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed with costs.

February 11, 1830.

THE question was as to the responsibility of an executor who had disclaimed. He executed a disclaimer, as he stated in his second answer, on the 23d February; yet it appeared that he did some prior acts.

The MASTER OF THE ROLLS. In the absence of circumstances, he would be thought to have acted as executor; but by the evidence he was only acting as agent of the other executor, and as a kind friend of the family, friendly advising them in the disposal of the estate. It is perfectly plain that the defendant never meant to act as executor.

Bill dismissed, as against that executor, with costs.

Account directed against other parties.

## Rofe *v.* Sowerby.

1 *Tamlyn*, 376.

The testator directed his personalty to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter.

She died under twenty-one:

Held, a vested interest.

*Rolls*, February 13, 1830.

JOHN ROFE by his will bequeathed in the following manner:—"I direct all my just debts, funeral expenses, and the charge of proving this my will, be fully satisfied and paid. I desire that my furniture and linen may be sold after my decease to be converted into money, together with my funded property and house; likewise 50*l.* which I am entitled to from my club, be invested in the hands of my executors for the sole use and maintenance of, bringing up and supporting my dear daughter Rebecca Warman Rofe until she arrives at the age of twenty-one; and when she attains the age of twenty-one, to receive the overplus, should there be any remaining from the above funded property, house, and 50*l.* left me by the club, after paying the expenses incurred for the maintenance, support, and education of my daughter Rebecca

Warman Rofe, the remainder to be paid into her hands for her sole use and disposal."

Rebecca Warman Rofe died under age, unmarried, and intestate, leaving the plaintiff, her only surviving aunt and next of kin.

The testator left three sisters, the plaintiff, and two others who died in the lifetime of Rebecca Warnan Rofe; and the question was, whether the bequest was vested in Rebecca Warman Rofe? If it were, the property went to the plaintiff as her surviving aunt and sole next of kin; on the other hand, if it did not pass, it became the property of the plaintiff, in conjunction with the representatives of the two deceased sisters.

The MASTER OF THE ROLLS. I am of opinion that this is a vested interest.

Declare that it was vested in R. W. Rofe the infant; and upon her death, intestate, under twenty-one, went to her next of kin.

Refer it to the Master to ascertain who were the next of kin of Rebecca Warman Rofe at the time of her death.

Reg. Lib. 1829. B. fol. 766.

## Barton *v.* Tattersall.

1 *Tamlyn*, 378.

A person who had been twice discharged by the court for the relief of insolvent debtors died possessed of considerable property:

Held, that this court could administer the fund: that first the creditors subsequent to the second insolvency should be paid; then those after the first insolvency; and, lastly, those before the first insolvency.

The statute of limitations does not affect the creditors of an insolvent in respect to the time elapsed since his discharge.

*Rolls*, February 16, 1830.

PHILIP JACOBS, on the 14th September 1814, was discharged from the King's Bench prison by the commissioners under the act for the relief of insolvent debtors, having previously executed the usual assignment to the provisional assignee. He subsequently resumed his business, and again becoming embarrassed, on the 22d day of February 1820 he again took the benefit of the act, making the usual assignment to the provisional assignee, and entering into the recognizance required by the act 54 G. 3.

He subsequently became possessed of property; and on the 4th of December 1826 he made his will, and thereby appointed the defendant, Edmund Tattersall, his executor.

The testator died on the 6th of January 1827; the defendant proved his will, and possessed himself of exchequer bills, long annuities and other property. The plaintiff was the assignee under both insolvencies, and was a creditor under each of them.

The bill stated the preceding facts, and charged that the personal estate of P. Jacobs was more than sufficient to pay in full and discharge

all his debts due at the time of his death, and which were contracted after his discharge as aforesaid; that after payment thereof, a very considerable surplus would remain, and would be applicable, and ought to be applied, in and towards payment of the plaintiff and the other scheduled creditors of the said P. Jacobs, under his insolvencies as far as the same would extend; and that the plaintiff was entitled to receive such surplus in order to apply the same accordingly. The bill prayed to that effect.

The defendant admitted, by his answer, that there would be a surplus after paying the debts of the testator contracted subsequently to his discharge under the insolvent debtors' act; and he submitted to act under the direction of the court.

Mr Pemberton and Mr Parker, for the plaintiffs, called the attention of the court to the statutes for relief of insolvent debtors in England: this case is not within the provisions of the statute of limitations; that statute bars the remedy, but does not destroy the right. By the acts for the relief of insolvent debtors in England, although the debtor be discharged, yet his goods and chattels are still liable: the legislature, contemplating that the insolvent might acquire future property, provided for the interest of the creditors upon it; which shows the intention of the legislature that the statute of limitations should not apply. The insolvent died in 1826, possessed of considerable property; and his executor in his answer admits that he had more than was sufficient for payment of all his debts: the estate is liable for the debts contracted before the insolvencies, after payment of the debts subsequently contracted.

Mr Bickersteth and Mr Merivale for the defendants. The plaintiff is the assignee of both insolvencies; the insolvent debtors' court has refused to put the recognizances in force; the insolvent acts discharge the person and not the estate, so that creditors have the same remedy against the property of the insolvent as if the act had not been made. The insertion of the name of the creditor in the insolvent's schedule does not alter the case, and that is all the insolvent has done: there is, therefore, nothing here to bar the operation of the statute of limitations.

Mr Pemberton. The assignee of an insolvent is no more barred by an insolvency than the assignee of a bankrupt, who can claim all his property up to the time of his certificate.

The Master of the Rolls. This is the case of a bill filed by the assignee of an insolvent debtor. All the acts present only the liability of the estate of an insolvent to the payment of the debts from which he has been discharged after the payment of his subsequent debts. They all present a particular mode, which has not been pursued in the present case; and the question is, whether a court of equity can administer the assets in its own mode? I am of opinion that it can. The insolvent has taken the benefit of the act twice; and the order of the court must be, to pay last the creditors under the first insolvency. I do not consider the lapse of ten years of any importance; for this case is not within the statute of limitations.

[Barton *v.* Tattersall.]

Declare, that after payment of the debts and funeral expenses since the last insolvency, the surplus assets of the testator's estate is applicable to the payment of debts under the second insolvency, and then in payment of the debts under the first insolvency.

The usual accounts and directions.
Reg. Lib. A. 1829. fol. 1118.

## Watson and another *v.* Reed.

1 *Tamlyn*, 381.

A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for specific performance more than twelve months after that notice, the court held, that it was an unwarrantable delay, and dismissed the bill with costs.

*Rolls*, February 15, 1830.

THE plaintiffs, on the 1st day of June 1826, contracted to sell some houses to the defendant. The plaintiff's solicitor delivered an abstract in due time, and in September 1826, the defendant's solicitor examined it with the title deeds, and on the 21st September 1826, the defendant's solicitor returned it to the solicitor for the plaintiffs, with inquiries and observations. Some further correspondence passed on the title, and on the 7th April 1827, the defendant's solicitor wrote to the solicitor of the plaintiffs that, under all the circumstances, the defendant declined to complete the purchase.

On the 20th of April 1828, and not till then, the plaintiffs filed their bill for specific performance. The defendant by his answer submitted that no part of the purchase-money, nor any interest thereon from any time, remained due from him on account of the purchase, inasmuch as he insisted that by reason of the lapse of time after the notice given by him of the abandonment of the purchase until the adoption of any proceedings on the part of the plaintiffs to enforce the said agreement, the plaintiffs must be deemed and considered to have acquiesced in such abandonment, and could not now enforce the performance thereof.

Mr Preston and Mr Girdlestone for the plaintiffs.
Mr Hayter for the defendant.

The Master of the Rolls. On the 7th of April 1827, the vendors are informed that the purchaser would not complete the contract, and the vendors take no step until the 20th of April following, more than twelve months; when they file this bill. This is a most unreasonable delay, and the vendor is not entitled to the interference of this court.

Bill dismissed with costs.
Reg. Lib. 1829. B. p. 621.

## Saberton *v.* Skeels.

1 *Tamlyn*, 383.

A testator having given by his will legacies to his several daughters, directed that 1000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should after her death pass and be subject to any will or disposition she might under her hand and seal make thereof, and for want thereof should go to her personal representatives.

The plaintiff married, in succession, two of the daughters:

Held, that the words "personal representatives," mean executors and administrators; that the wife took an absolute interest, and that the husband on her death became absolutely entitled.

The marriage with the second sister having been solemnized in Scotland, an inquiry was directed, whether it had actually taken place.

*Westminster Hall*, June 12, 1830.

THOMAS SKEELS, by his will, having directed his trustees to convert his personal estate into money, directed them to pay his debts; secondly, 400*l.* to his wife; thirdly, to pay to his daughter Elizabeth, the wife of Mr Joseph Saberton Saberton of Chattens, the sum of 1000*l.* at the end of one year after his decease, to be settled in the same manner, and subject to the same uses, powers, and limitations in every respect as were thereinafter contained as to the respective sums of 1000*l.* to be settled on his daughters as was thereinafter mentioned; and, fourthly, to pay to each of his daughters, Mary, Harriett, Ann, Joanna, and Sarah, and to any child or children which he might have after the making of that his will, or who might be born after his decease, the sum of 2000*l.* each, to be paid to them as thereinafter was mentioned. And as to the said several sums of 2000*l.*, the testator thereby directed the interest of the share of each of them to be computed from the day of his decease, or as much thereof as might be necessary to be paid and applied for their bringing up, education, or other advancement, until they should respectively attain the age of twenty-one, or, if a daughter, until her marriage, if she marry under twenty-one with the consent and approbation of his said trustees, or the survivors or survivor of them, or of the executors or administrators of such survivor; and upon any of them attaining the age of twenty-one years, or upon the marriage of any daughter before that time with such consent as aforesaid, then he directed, that as to such daughter, the sum of 1000*l.*, together with the whole accumulations of interest, be paid to such daughter; and that the remaining 1000*l.* to each be settled as thereinafter mentioned; and as to the said several sums of 1000*l.* so to be settled, he did thereby direct that each sum of 1000*l.* so belonging to each be invested in the funds in the names of his said trustees, and the daughter entitled to the same, or should, in the same names, be put out on real security, the interest thereof to be paid to his daughter entitled to the same, for which her receipt alone should be sufficient, and which should not be subject to the debts or control of any husband she might have, and

should, after her death, pass and be subject, according to any will or disposition she might, under her hand or seal, make thereof, and for want thereof, should go to her personal representatives; and if the daughter so entitled to the 1000*l.* should at any time choose to sink the same, or any part thereof, in the purchase of one or more annuities for her own life, in like manner payable to her sole use, and not subject to the debts of her husband, his said trustees, together with such daughters, were thereby authorized and required to invest the same accordingly on government or good real security, but not otherwise. The plaintiff married two of the daughters, Elizabeth and Harriett; they are both dead. Elizabeth left three children. Neither of those daughters made any will or disposition of the funds, and the plaintiff took out letters of administration to the effects of each of them.

Mr Tinney, and Mr Preston, for the plaintiffs.

Mr Tinney. The question is, whether the husband is not entitled to the portions of the two sisters whom he married in succession, those sisters having died without making any appointment, and the husband having survived them? In the case of Price *v.* Strange, 6 Mad. 350; the testator directed the money arising from the sale of his real estates to be divided amongst such of his children as should be then living, *and the legal representative or representatives of him, her, or them, as should* be then dead; and your honour there said, that the ordinary sense of legal representatives is executors or administrators, and that the children took a vested interest. The cases of Evans *v.* Charles, 1 Anstr. 128; and Bridge *v.* Abbott, 3 Mad. 224; were cited; in the former, a testatrix directed, that if a legatee died in her lifetime the legacy should be paid to her personal representatives, and the court held that her administrator took beneficially. The words "personal representatives" are words of limitation,—in some cases there has been a difference of phrase,—but here we have the term "*personal representatives*," which is as definite with regard to chattels as "*heirs*" is to land. There are two other cases in which the point was adverted to, Anderton *v.* Dawson, 15 Ves. jun. 542. Baley *v.* Wright, 18 Ves. 49.

I submit that the testator has done no more in the events that have happened than to give a vested interest.

Mr Preston. The words are, "personal representatives," not "next of kin," which is a most important distinction. Words must be construed in their genuine sense, unless a different construction can be put upon them by the context of the instrument. Was it ever decided that "personal representatives" meant next of kin? When next of kin take as purchasers, you must not look at the statute, but the kindred; so that if there were a child, and ten children of a deceased child, the living child alone would take, and persons of a different degree of relationship would be excluded.

Your honour's attention has been already called to this in the case of Price *v.* Strange, and we invite your honour to come to the same conclusion. What is the difference between personal representatives and executors and administrators? Can next of kin be said to be personal representatives? Would next of kin be liable to debts? They may be claimants. In my judgment, the purposes of justice will be best served by holding that the words "personal representatives" are the same as

executors and administrators. I also admit, that executors and administrators will take in the characters of executors and administrators, and for the purposes of distribution. It was so defined by Lord Eldon in the case of Wellman *v.* Bowring, 1 Sim. & Stew. 24, and 2 Russell, 374; the case of a surrender of a copyhold to two persons upon certain trusts, and ultimately upon trust to surrender to the use of the executors or administrators of B.: the wife of B. was his administratrix, and she took the fee; but she took it in her character and clothed with her duties of administratrix, and distributable as if personal estate, to be applied in a due course of administration.*

The plaintiff, being administrator of each of his wives, will also be entitled, if the court should hold him to take as a purchaser.

Mr Lynch. I appear for the three children of Elizabeth. This case is quite different from the case of Price *v.* Strange. I admit the general rule, but there is that in the will which will exclude the husband. The testator gives it to Elizabeth for life to the exclusion of her husband, and does not give him any interest. The wife, by the will, has the power to sink it in the purchase of annuities for her own life with the consent of the trustees, and without the privity of the husband, and those annuities are also to be held for the separate use of the wife. Is it not reasonable, therefore, to conclude that the testator meant to exclude the husband except by the execution of the power in his wife? she has not executed it, and the husband is therefore excluded. There is as much in the case before the court to exclude the administrator as in the case of Long *v.* Blackall, 3 Ves. jun. 494, to exclude the wife. In Price *v.* Strange, the gift to the legal representative immediately followed the bequest to the child; here a power intervenes. The case of Baley *v.* Wright, *ante*, is also in favour of my proposition. In the case of Garrett *v.* Lord Camden, 14 Ves. 372, Lord Eldon held that the widow is not one of the next of kin; the husband here can not take as next of kin; and a husband can not take as sole next of kin; the intention was to exclude the husband. By the case of Ripley *v.* Waterworth, 7 Fes. 425, 442., the executor could only take in that character, and as trustee for the residuary legatees. On the same principle my clients are entitled. He may take it, so as he let my clients have it again.

The Master of the Rolls. The court should not be influenced by the doubtful construction of detached sentences, but proceed upon some settled principle. The words "personal representatives, if taken in the ordinary sense, would be "executors and administrators." The wife would take an absolute interest, and the husband be entitled to administration; he did administer, and became, therefore, the personal representative.

Is there any thing in this will to control the plain ordinary sense of personal representatives?

* The reports cited do not go to this extent, but this case of Wellman *v.* Bowring came on to be heard upon further directions on the 1st February 1830, before the Vice Chancellor, when it was decided that the administratrix took the equitable fee as part of the personal estate for the benefit of herself and the next of kin, according to the statute for distribution of intestate's estates.—Reg. Lib. 1829. B. p. 1489.

[Saberton *v.* Skeels.]

It is said that the child had the power to purchase an annuity; but that shows an intention that she should take an absolute interest.

I am of opinion that there is nothing in the will to control the ordinary sense of the words "personal representatives."

I shall declare the husband entitled to the portion of the first wife.

With respect to the portion of the second wife, I shall declare it to be a part of her personal estate, and I shall direct an inquiry whether he was legally married to her.

A marriage to the sister of a deceased wife is voidable, and if not made void during her life, it can not be made void afterwards.

I would declare that the two daughters were absolutely entitled, and that the husband as administrator of his wife Elizabeth should have her share, and there should be an inquiry whether he was legally married to the second sister. As to that there can be but little doubt, the marriage having taken place in Scotland,—and so little there constitutes a marriage.

If the husband does not establish his title as husband to the second wife, he will not be entitled to all the costs, but if he does, he will be entitled to them.

Decree that the plaintiff, as the personal representative of his wife Elizabeth, is entitled to the legacy of 1000*l.* and interest at four per cent., to be calculated from the end of one year from the death of the testator.

Decree that the Master inquire whether Harriett was at the time of her death married to the plaintiff, and if that inquiry be waived, then that payment be made to the plaintiff as the personal representative of Harriett, of what shall be found to be due in respect of the legacy of 2000*l.* and interest so given and bequeathed to her.

Reg. Lib. 1829. B. P. 2300.

## Between James Platt, plaintiff; and John M'Dougall and James M'Dougall, defendants.

1 *Tamlyn*, 390.

On a marriage the father of the wife purchased 1000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest.

This daughter, married J. M., and died in the lifetime of the mother, leaving J. M. her surviving.

J. M. did not take out administration to the effects of his deceased wife, and afterwards died:

Held, that his executors were entitled to the 1000*l.* consols, and that the representatives of the wife were not entitled.

[Platt *v.* M'Dougall.]

One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the court gave costs against both of them.

*Rolls*, February 15, 1831.

BY indenture bearing date the 15th day of March 1760, being the settlement made previous to the marriage of Josiah Purdew and Isabella Wrigglesworth; it is witnessed, that the sum of 1000*l.* 3 per cent. consols therein recited to have been purchased by the father of the lady as her marriage portion, and invested in the names of T. Wilson and C. Wrigglesworth, was so purchased, and invested in trust after the marriage, that the trustees should pay unto and permit the wife to receive and take the dividends during her life for her sole and separate use; and in case the husband should die in the lifetime of the wife, then from and after her decease in trust for the children of the marriage as therein mentioned, and in some events in trust to transfer the 1000*l.* and dividends in arrear unto the wife for her own absolute use and benefit. The trusts for the children, and the events on which the trust for the wife depended, were expressed in ambiguous terms, but the effect of them was determined in a former suit, which will be presently stated. The husband died in March 1792, in the lifetime of the wife, and leaving a daughter, Sarah Purdew, the only issue of the marriage.

This daughter married Admiral John M'Dougall, and died in April 1802, in the lifetime of her mother and leaving her husband her surviving.

Admiral M'Dougall did not take out letters of administration to his wife, and died in November 1814, having by his will appointed Mary, his second wife, during her widowhood, and James M'Dougall, surgeon, and the plaintiff, executors, who duly proved the will. Mary, the widow, afterwards married Mr De Beauvoir.

Isabella Purdew died in September 1822, having appointed Wm. Masson and Thomas Masson her executors, who duly proved her will.

John M'Dougall, the son of the Admiral, by Sarah his wife, on the 16th of January 1823, took out administration to the effects of his mother.

In January 1823, the executors of Isabella Purdew exhibited their bill against the then trustees of the fund, Mary M'Dougall, widow, and the plaintiff and defendants to the present suit, stating that, by the death of Sarah M'Dougall in the lifetime of Isabella Purdew, they were, as the personal representatives of the latter, entitled to the 1000*l.* and dividends discharged from the trusts of the settlement; but it was decreed (see Reg. Lib. 1824. B. p. 2038. April 1825.) that Sarah M'Dougall, the daughter of Isabella Purdew, took a vested interest in the 1000*l.*; and it was decreed that, after payment of cost, the residue of the 1000*l.* and dividends should be transferred to John M'Dougall, the personal representative of Sarah M'Dougall, and it was so transferred.

On the 29th of April 1829, the plaintiff filed the bill in this cause, claiming the residue which had been transferred to John M'Dougall, and that this sum in fact belonged to James M'Dougall and plaintiff as the legal personal representatives of Admiral M'Dougall, and that John M'Dougall was a mere trustee for James M'Dougall and the plaintiff.

The defendant, James M'Dougall, by his answer said, he did not admit that he and plaintiff ever were entitled to it as the personal re-

presentatives of the admiral, or that the same was a part of his personal estate, or that the other defendant was a mere trustee for this defendant and plaintiff as such personal representatives; but submitted the same as a question of law to the consideration of the court. He admitted application by the plaintiff to join in the suit, but added that he had refused to join and concur, not conceiving it a proper or necessary suit.

John M'Dougall, by his answer, denied the plaintiff's interest.

Mr Pemberton and Mr O. Anderdon, for John M'Dougall, the administrator of his mother.

A husband is entitled to his wife's property only in the character of administrator; and had Admiral M'Dougall taken out letters of administration to his deceased wife he might have received the money, subject to the payment of debts; but he did not do so, and the plaintiff, his personal representative is not entitled. John M'Dougall is in the situation of a trustee, and is at all events entitled to his costs.

Mr Swanston, for Mr James M'Dougall, asked for costs.

The Master of the Rolls decreed, that the defendant John M'Dougall should transfer the stock to plaintiff and defendant James M'Dougall, as executors of Admiral M'Dougall; and his Honour being of opinion that the defendants had combined in the defence, and that the transfer ought to have been made without suit, gave costs against both of them.

Reg. Lib. 1830. B. p. 913.

## The Attorney-General, at the relation of the President and Governors of the Hospital founded at the costs and charges of Thomas Guy, Esquire, *v.* The Governors of Christ's Hospital.

1 *Tamlyn*, 393.

In 1724 a testator gave 400*l.*, per annum to the governors of Christ's Hospital, upon condition that they received four boys or girls annually, to be nominated by the relators. They received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them:

Held, that this was a gift upon condition, and having accepted the gift, they were bound to the condition.

*Westminster Hall*, June 22, 1831.

THOMAS GUY, by his will, dated 4th September 1724, gave and devised as follows:—

"Item, I give to the president and governors of Christ's Hospital, in London, and their successors for ever, one annuity or yearly sum of 400*l.*, to be paid by my said executors till such intended corporation (alluding to a charter of incorporation for Guy's Hospital) shall be obtained and take effect, and then by such intended corporation, or their

treasurer for the time being; provided nevertheless, and upon this condition, that my said executors and such intended corporation, and their successors, shall have liberty from time to time to nominate and put into Christ's Hospital aforesaid yearly and every year for ever at Easter, or within six months after, such four poor boys or girls, whether orphans or otherwise, or the children of freemen of the city of London, or unfreemen not less than seven, or more than ten years of age, as my said executors or the said intended corporation, and their successors, shall think fit, with preference to my relations as often as any such shall offer themselves, who shall be received into the said hospital, and have the maintenance and education thereof, and be continued therein in like manner as other children are maintained and educated in the said hospital; and my will is in that case, and as often as the said president and governors of Christ's Hospital shall neglect or refuse to take in the said number of boys and girls to them nominated and qualified as aforesaid, it shall be lawful for my said executors and the said intended corporation, and they are hereby directed and desired, to apply the said annual sum of 400*l.* to the education and maintenance of such four poor children as aforesaid in such other school or place, and in such other manner, as they shall think fit."

From the death of the testator the governors of Christ's Hospital received the annuity and four boys annually until 1827, when they passed a resolution that they would do so no longer.

Mr Pemberton and Mr Wigram for the relators. The question is, whether the governors of Christ's Hospital having accepted an annuity of 400*l.* a year given by the will of Guy, they are not now bound by the acceptance and to the conditions which accompanied the gift?

The governors of Christ's Hospital have power to accept gifts of this description, and that is not now in dispute between us. They say they were to be at liberty under a clause in the will to renounce the bequest; but the construction we put upon it is consistent with the plain intention. An authority is given to the executors, but still holding Christ's Hospital to their engagement.

By accepting the annuity the governors of Christ's Hospital are bound to perform the conditions.

Mr Bickersteth and Mr Phillimore for the governors of Christ's Hospital. This is a case in which a yearly sum of money is given upon a yearly condition. Four boys a year, in six years, the period of education, make twenty-four, which is the number the hospital has to educate under this bequest. The testator contemplated that the governors might at some future time refuse to take in the number of boys, and provides accordingly. It is found that the 400*l.* a year is not sufficient to maintain twenty-four boys, 16*l.* 3*s.* 4*d.* only each, and consequently the funds of the charity are affected by this gift. The funds, destined to other objects, must be withdrawn for the maintenance of these boys and girls. It is become an incumbrance upon the other funds, and the governors have refused to allow a continuance of it unless it shall be decreed against them.

The Master of the Rolls.—The question here is, whether this

is a gift of this annual sum, so long as they shall receive the four children, or a gift upon condition that they receive four children yearly?

It is clear that the latter is the true construction; and having accepted it, they are bound to the condition. The proviso only means this, that the testator would give a collateral remedy to apply the fund to the education of the children in case the governors of Christ's Hospital should omit to receive them, but that does not release Christ's Hospital from their acceptance for ever of this annual sum of 400*l.*

Declare that the annuity has been accepted; that it has become part of the assets; and that the defendants are now at liberty to reject the annuity.

The governors to receive four children for each of the preceding years 1828, 1829, and 1830, and four children each year hereafter, upon due payment of the annuity.

Reg. Lib. 1829. A. p. 2521.

## Green *v.* Spicer.

1 *Tamlyn*, 396.

A testator gave a dwelling-house and a piece of land to trustees upon trust, to receive the rents and apply the same for the board, lodging, maintenance, support, and benefit of the testator's son, as they should think proper, for his life; and the application thereof for the benefit of the son, was to be at the entire discretion of the trustees; and the son was not to have the power in any way to sell, mortgage, or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors. The plaintiffs were his assignees:

The court decreed a conveyance to the plaintiffs. Trustees to retain their costs as between solicitor and client.

*Rolls*, March 2, 1830.

ROBERT PINNING, by his will bearing date the 17th day of October 1815, gave a dwelling-house and piece of land unto and to the use of John Spicer and Daniel Robinson, two of the defendants, their heirs and assigns for ever, upon trust, to let and manage the same and receive the rents, issues, and profits thereof, and apply the same rents, issues, and profits, to or for the board, lodging, maintenance, support, and benefit of the testator's son, Robert Pinning the younger, at such times and in such manner as they should think proper for and during the term of his natural life; and it was thereby declared to be the testator's wish, that the application of the rents, issues, and profits, for the benefit of his said son, might be at the entire discretion of the said John Spicer and Daniel Robinson, and the survivor of them, and the heirs and assigns of such survivor; and that his, said testator's, son should not have any power to sell or mortgage, or anticipate in any way the same rents, issues, and profits, or any rents, issues, and profits, dividends or interest derived under the said testator's will.

The testator died in 1826; and his son in 1827 took the benefit of the

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act for the relief of insolvent debtors in England. The plaintiffs are his assignees.

The bill charged that the defendant, Robert Pinning the younger, notwithstanding his insolvency, claimed to be beneficially entitled to the rents and profits of the said hereditaments; and that, under the will, they were not capable of being alienated or affected by any act of his own.

The bill prayed that the plaintiffs, as such assignees, might be declared entitled to the rents and profits of the hereditaments for the life of the said Robert Pinning the younger.

The defendants, Spicer and Robinson, in their answer, said, that they were advised that it was the intention of the testator that Robert Pinning the younger should have no control whatever over the rents and profits; and that they should receive the same, and apply them, as in their discretion seemed fit, for the board and lodging, maintenance, support, and benefit of Robert Pinning the younger.

R. Pinning the younger, by his answer, insisted upon that construction and effect of the will.

Mr Bickersteth for the plaintiffs, cited Brandon *v.* Robinson, 18 Ves. 429; and Brandon *v.* Robinson and Davies, Rose's Bankrupt Cases, 197.

Mr Agar and Mr Parker, for the defendants the trustees, cited Thomas *v.* Freeman, 2 Vern. 563.

The Master of the Rolls decreed that the plaintiffs, as assignees of Robert Pinning the younger, the insolvent, were entitled to the rents and profits during the life of the insolvent, and that the defendants, the trustees, should pay the same to the plaintiffs, after deducting their costs, to be taxed as between solicitor and client.

Reg. Lib. 1829. A. p. 1178.

## Between William Kinsman, plaintiff; and Simon Kinsman, William Kinsman, his son, and John Inglett Fortesque, Esq., defendants.

1 *Tumlyn*, 399.

A testator gave lands to A. in strict settlement, and a manor to B. in strict settlement. On his death a creditor's bill was brought for the administration of assets, and it appearing that the testator owed a debt on mortgage, and some specialties, the Master was directed to ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage.

The Master sold the manor and lands. The title to the lands was completed, and the purchase money paid, but no good title could be made to the manor. The report was confirmed in 1798. B. continued in the possession of the manor, and never paid the contribution; and in 1824 he and his eldest son having suffered a recovery, sold it to J. I. F. In 1825 A. died, and in the same year his eldest son, tenant in tail, filed his bill against B., and his eldest son, and the purchaser. Decreed, that this was a pur-

chase *pendente lite;* and the contribution reported by the Master to be paid from the estate devised to B., with interest and costs, was ordered to be raised by sale and mortgage, and paid to the plaintiff.

*Westminster Hall,* June 17, 1830.

WILLIAM KINSMAN, by his will dated the 16th January 1778, devised all his messuages, lands, and hereditaments called Higher or Parish Hay, Sandy Park, and Quarry Park, in Lamerton in Devonshire, unto John Rowe and John Kinsman his brother, and their heirs, in trust for and to the use and behoof of his nephew William Kinsman (the father of the plaintiff,) the eldest son of his brother John Kinsman, for life; remainder to trustees, to preserve contingent remainders; remainder to the first son of the body of the said William Kinsman his nephew, and the heirs male of his body; remainder to the second and other sons successively in tail male; remainder to the right heirs of his brother John Kinsman.

The testator, by his will, also devised his manor of Northcombe, in Bratton Clovelly, in Devonshire, together with 5*s.* yearly, payable out of the manor of Shupston unto the same trustees, in trust to and for the use of his nephew, the defendant Simon Kinsman, the third son of testator's brother, John Kinsman, for life; remainder to trustees to preserve contingent remainders, with remainder to the first and every other son of the body of Simon Kinsman, and the heirs male of the bodies of such first and other sons respectively, severally and successively in tail male; remainder to the right heirs of his brother John Kinsman for ever. And the testator thereby also gave, devised, and bequeathed all his goods and chattels, and all other his real, personal, and testamentary estate unto his nephew Wm. Kinsman, his heirs, executors, and administrators, and appointed him executor of his will.

The testator died on the 2d of May 1780, and his will was proved by the executor; and shortly after his death a creditor's bill was filed for the administration of the real and personal estate of the testator, in which his said nephews, William Kinsman and Simon Kinsman, and also the plaintiff first tenant in tail of the Lamerton estates; and the defendant William Kinsman, son of Simon Kinsman, and first tenant in tail of the manor of Northcombe, and John Carpenter a mortgagee, and other necessary parties, were defendants. The cause was heard at the Rolls on the 23d of May 1792, when the usual accounts were directed to be taken, and advertisements published; and it was ordered, that in case the testator's personal estate should not be sufficient for the payment of all his debts, that the deficiency as to his specialty debts ought to be raised and made good out of the testator's real estate, which passed by his will, in proportion to the value of the said real estates respectively, and the Master was to settle the proportions in which the said estates ought to contribute, to make good the deficiency of the personal estate for the payment of specialty debts; and such deficiency to be raised by sale or mortgage of the said estates respectively, according to such apportionment. The estate devised by the testator to his nephew Wm. Kinsman was in mortgage to the defendant Carpenter, and was valued at 2060*l.*; the other estate devised to Simon Kinsman was valued at 1491*l.* 14*s.* At an auction the former was sold for 3400*l.*, and the latter for 1687*l.* 12*s.* The 3400*l.* was paid into

court, and the lands conveyed by the mortgagee and Wm. Kinsman, the tenant for life, in February 1798; but the plaintiff being then an infant, the Master reported that he ought to be directed to join in proper conveyances and recoveries to be suffered upon his attaining twenty-one years; but he reported that a good title could not be made to the manor of Northcombe devised to Simon and his sons, and therefore he did not settle the proportions of the contributions. This report was confirmed on the 20th February 1798, and on the 13th March 1798; when the cause came on upon further directions, it was ordered that the costs should be paid, and then the sum of 1099*l.* 2*s.* 5*d.* to the mortgagee for his principal, interest and costs, and several other sums. By a subsequent report, dated 7th of June 1798, the Master found that the manor of Northcombe ought to contribute and bear the sum of 873*l.* 1*s.* 8*d.*, as the proportion, with the Lamerton estate which had been sold, of the several sums by the order directed to be paid out of the 3400*l.*

The report was confirmed on the 13th June 1798.

William Kinsman, the father, died in February 1825, leaving plaintiff, his eldest son, and first tenant in tail of the estate sold. The plaintiff took out administration to the effects of his father. The plaintiff charged that his father was a pauper, and was unable to raise money to prosecute his claim, and that plaintiff was also a labouring man in indigent circumstances, and was ignorant of his right until after the decease of his father, but upon being made acquainted with it, he took steps to enforce it.. This charge was supported by evidence. In the mean time, in the year 1824, Simon Kinsman, and his son, sold the manor of Northcombe to the defendant, John Inglett Fortesque, for 2700*l.* The bill prayed that the defendants might pay the sum of 873*l.* 1*s.* 8*d.* and interest, or that the same might be raised by sale or mortgage.

The defendants, Simon Kinsman and William his son, submitted that this was a stale demand, and ought to be considered satisfied after such a lapse of time and such laches; and they insisted on the benefit of the statute of limitations of King James I., and the analogy to that statute adopted by courts of equity.

The defendant Fortescue, by his plea and answer, insisted that he was a purchaser for a valuable consideration, and denied notice of the claim of the plaintiff and of the decree.

A witness proved a conversation with defendants, Simon and William Kinsman, in 1818, when one of the defendants stated that a claim had been made to the Northcombe estate, but that the claimant would never be able to make a title to it, because the deeds had been buried in a crock; and another witness proved that he had frequently seen them at their solicitor's, and that about two years since he, witness, had a conversation with that solicitor, when the latter said that he had recommended Simon Kinsman to settle with the complainant before the estate of Northcombe was sold.

Mr Pemberton and Mr Daniel for plaintiff.

The estate devised to Simon Kinsman not having been sold remained liable. He secreted the title-deeds to prevent the estate being sold. The person entitled for life became a pauper, and did not die until 1825,

when his eldest son, the plaintiff, tenant in tail, became entitled to this sum of money. A decree, which is a final decree in a cause, is not notice to a purchaser, but the pendency of a suit is notice to a purchaser. Worsley *v.* Earl of Scarborough, 3 Atk. 392; Gove *v.* Stackpoole, 1 Dows. 18. And there being in this case a suit pending, that suit was notice to Mr Fortescue the purchaser.

Mr Tinney and Mr Parker for Simon and William Kinsman.
Mr Bickersteth and Mr Kindersley for Mr Fortescue.

The Master of the Rolls. I shall charge the estate, and those who purchased the estate *lite pendente* are liable; this is plainly *lite pendente*.

Decree that the Master take an account of what is due to the plaintiff in respect of the said sum of 873*l.* 1*s.* 8*d.*, and that he calculate interest at 4*l.* per cent. from the 7th June 1798, the date of the Master's report; and that the said sum and interest, with costs, be raised out of the estate by sale or mortgage, and paid to the plaintiff.

Reg. Lib. 1830. A. p. 100.

## Eliza Fellowes Mary Owen, by Robert Hennessy Moore Ogle, her brother and next friend, plaintiff; and John Thomas Lys, William James Pistor, and Samuel Owen, defendants.

1 *Tamlyn*, 404.

Bequest to a married woman to her separate use. The court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to her to apply.

*Westminster Hall*, June 28, 1830.

THE Rev. George Ogle, the uncle of the plaintiff, by his last will and testament in writing, dated 18th November 1823, after giving divers specific and pecuniary legacies, gave and bequeathed, among other things, to each of the children of his late brother Colonel Robert Ogle, viz. to Emma Powles, (wife of John Diston Powles,) Sophia Ogle, Robert Hennessy Moore Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and the plaintiff Eliza Fellowes Mary Owen, (then Eliza Fellowes Mary Ogle,) the sum of 1000*l.* And the testator declared his will to be that all the bequests therein, or any codicil or codicils thereto, made or to be made in favour of the said Emma Powles, Sophia Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and Eliza Fellowes Mary Ogle, should be free from the debts, control, and engagements of their or either of their present or future husband or husbands, and to and for their own respective sole and separate use and benefit absolutely, notwithstanding coverture; and as to all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever not therein and thereby dis-

posed of, he gave, devised, and bequeathed the same, and each and every part thereof, unto and amongst the said Emma Powles, Sophia Ogle, Robert Hennessy Moore Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and the plaintiff Eliza Fellowes Mary Owen, their heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And the testator thereby appointed the defendants, John Thomas Lys and William James Pistor executors of his will.

The plaintiff attained her age of twenty-one years on the 21st September 1825, and subsequently to the death of the testator, on the 12th August 1828, married the defendant Samuel Owen, and the bill stated that the bequests made by the will to the plaintiff being made to and for her sole and separate use and benefit, notwithstanding coverture, no settlement thereof was executed prior to or subsequent to the marriage. The plaintiff's legacy of 1000*l.* was paid.

The defendants realized 14,500*l.* as the residue. And the bill prayed that the defendants Lys and Pistor might be decreed by the court to pay to the plaintiff, for her sole and separate use, one sixth part or share of the sum of 14,500*l.* admitted by them to be in their hands; and might be decreed to pay to the plaintiff, for her sole and separate use, her sixth part or share of the residue of the testator's estate outstanding and unreceived as when the same should be collected in and received by the defendants Lys and Pistor; and that the defendants Lys and Pistor might pay the costs of the suit.

The defendants, the trustees, submitted to the court whether the plaintiff was entitled to receive her share without any settlement thereof being made upon her.

Mr Treslove and Mr Whitemarsh for the plaintiff.
Mr Tinney for the trustees.

The Master of the Rolls. Can an executor safely pay this money into the hands of a married lady when it is given to her separate use? The court does not do that. The court will throw a protection around her. Let it be carried to her account, with liberty to her to apply. We must give her the opportunity of deliberating by transferring it to her account.

Costs of all parties to be paid out of her share of the fund.

Decree that the defendants transfer into the name and with the privity of the Accountant-General, in trust, in this cause, "the separate account of the plaintiff Eliza Fellowes Mary Owen," the sum of 3411*l.* 5*s.* 3*l.* 10*s.* per cent. reduced annuities in respect of the plaintiff's share of the residuary personal estate of the testator; and any of the parties are to be at liberty to apply.

Reg. Lib. 1829. B. p. 1734.

## Banks *v.* Sladen.

1 *Tamlyn*, 407.

A. by his will, in October 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities. There were at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was prior to his death reduced to 3*l.* 10*s.* per cent.:

Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. still existing.

The testator having declared that the dividends should accumulate during the life of his daughters, and until their children respectively should attain twenty-five, when the principal should be transferred to the children, the court directed the dividends to accumulate for twenty-one years, if the daughter should so long live; but the court would not decide on the question of remoteness, as if the daughter left no issue the question would not arise, and the court will not decide an hypothetical case.

*Rolls*, Feb. 18, 1830.

JOSEPH SLADEN, Esq., by his will, bearing date 14th October 1822, gave unto his executors the sum of 12,500*l.* 4*l.* per cent. bank annuities, upon trust, to stand possessed thereof, and to invest the interest, dividends, and yearly proceeds, as the same should from time to time become due, in accumulation of the capital, during the natural life of his daughter Sarah, the wife of Lawrence Banks, and after her decease, upon trust, to transfer the principal to her children, begotten or to be begotten, equally, as they should respectively attain the age of twenty-five years; and the dividends of the share of such children as should be under the age of twenty-five at the decease of his daughter should accumulate until such children's shares respectively became payable, with a substitution of the issue of such children as should die in the daughter's lifetime; and cross remainders as between such children who should die without issue; with an ultimate limitation over in the event of his daughter dying without leaving issue.

The testator likewise gave to his executors the sum of 10,000*l.* 4*l.* per cent. bank annuities, in like manner, with respect to his daughter Caroline Matilda, the wife of William Smith, and her children.

The testator, at the date of his will, was possessed of 59,650*l.*, 4*l.* per cent. bank annuities.

By act 5 G. 4., entitled "an act for transferring several annuities of 4*l.* per cent. per annum into annuities of 3*l.* 10*s.* per cent. per annum," it was enacted, that persons possessed of 4*l.* per cent. annuities might, for every 100*l.* receive 100*l.* 3*l.* 10*s.* per cent.

The testator in his lifetime assented to the transfer.

The bill stated that there were other 4*l.* per cent. annuities, and prayed that a sufficient part of the testator's personal estate might be invested in the purchase of 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities, upon the trusts of the will.

The defendants stated in their answer, that at the date of the will there was not any other stock called the 4*l.* per cent. bank annuities save the stock in which the testator was entitled, at the time of his will, to the sum of 59,650*l.*, but that at the time of the answer there was no

[Banks *v.* Sladen.]

stock known by that name, and the only stocks which yielded a dividend of 4*l.* per cent. were either the new 4*l.* per cent. annuities, or the 4*l.* per cent. annuities 1826; and the defendants submitted, that the legacies would be satisfied by a transfer of 12,500*l.* and 10,000*l.* 3*l.* 10*s.* per cent. annuities.

Testator, at the time of his death, had 76,720*l.* 3*l.* 10*s.* per cent. annuities, converted from 4*l.* per cent. annuities. He also died possessed of 4725*l.* new 4*l.* per cent. annuities, derived from 4500*l.* navy 5*l.* per cent. annuities, at the reduction of the interest in that stock in July 1822, by the government giving 105*l.* new 4*l.* per cent. for every 100*l.* navy 5*l.* per cent.*

Mr Preston and Mr G. Warry for the plaintiff.

This is not a specific legacy, but a legacy of quantity; there are 4*l.* per cent. annuities now existing, and we claim to be satisfied in that stock. The act changed the 4*l.* per cents. to 3*l.* 10*s.* per cents., and had this been a specific legacy we should have been entitled to the amount of the legacy in the 3*l.* 10*s.* per cents. Swinburn, vol. i. 246; says that a legacy must be answered out of any fund capable of answering it. A case decided by Lord Eldon, Attorney-General *v.* Scriven, will probably be cited on the other side: there the testator bequeathed "all the residue of my 4*l.* per cent. consolidated annuities at the bank of England at my decease." Beyond all doubt that was a specific legacy. The Chancellor decided that the legacy was to be satisfied out of those 4*l.* per cents. only which would have existed had not the 5*l.* per cents. been reduced to 4*l.* per cents., but not to be increased by the reduction; and held that all the old 4*l.* per cent. annuities passed by the will, but not the new 4*l.* per cents.

Swinburn says, "that albeit the testator have no such thing of his own as is bequeathed, yet nevertheless the legacy is good in law," 1 Swin. 246, and 3 Swin. 922. The legacy there alluded to, as here, was not specific, but of quantity, as a horse, or a yoke of oxen; and Swinburn says, that the legacy is good in law, though the testator have neither horse nor ox of his own.

It has been decreed, that when the testator gives stock which he does not possess, the legatee is entitled to have stock purchased, Bronsden *v.* Winter, Amb. 57. This is a legacy of quantity.

In this case there are 4*l.* per cent. annuities, and the executors should be ordered to provide for the legacy out of them.

The testator's intentions will be best answered by ordering the legacies to be paid in the present 4*l.* per cents., for the testator certainly looked to income; but if the court should not think so, then we contend we are clearly entitled to have them satisfied out of the 3*l.* 10*s.* per cents. The act of parliament, 5 G. 4, c. 11, s. 20, provides for specific legacies, but not for legacies of quantity. We admit that the executors may pay us in either of the 4*l.* per cents. now existing:† whoever has

* See act 3 G. 4. c. 9, passed 15th March 1822.

† At the time of this discussion there were in fact two 4*l.* per cent. stocks; one, that reduced from the 5*l.* per cents., and since reduced to 3*l.* 10*s.* per cents., by an act passed 3d May 1830; and the other 4*l.* per cents. 1826, created by funding exchequer bills by the act 7 G. 4. c. 39, and which cannot be redeemed until after 5th April 1833.

to do the first act has the right of election. It is a general principle, that a person who has to make the transfer has his election, Fontaine v. Tyler, 9 Price, 94.

Mr Bickersteth for the executors. The thing supposed to be given must be capable of being procured: at the time of the death of the testator there was no such thing as he had given, nor can any such thing be obtained.

In Fonnerean v. Poyntz, 1 B. C. C. 472; before Lord Thurlow, his lordship said, "that if it had been doubtful out of what fund the legacy was to arise, that would have been matter to explain by evidence, in order to see whether the description applies aptly or not." And in Colpoys v. Colpoys,* the language of the bequest not applying strictly, and therefore being capable of two interpretations, Sir T. Plumer held that parol evidence might be let in.

The authority of both these cases has been recognized in the manuscript case cited of the Attorney-General v. Scriven.

The testator gave 12,500*l.* 4*l.* per cent. annuities, and he must have meant the 4*l.* per cents. then existing; no such stock can now be procured: then it is said the legatees are entitled to something else; but there is nothing in the act which relates to the will of a person living.†

Mr Heater, also, for the executors.

It is a specific legacy; it is specific with regard to its description, and where there is a latent ambiguity, parol evidence is admissible to prove the identity, Beachcroft v. Beachcroft, 1 Mad. Rep. 430: the words of the will are only applicable to the stock existing at the time. It was said by the court in Sandford v. Raiks, 1 Mer. 653, that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise.

In Doe dem. Jersey v. Smith, 2 Brod. & Bingh. 553, a case in the house of lords, Mr Justice Bayley says, "The evidence here is not to produce a construction against the natural meaning of the words; but because an indefinite expression is used capable of being satisfied in more ways than one, and I look to the state of the property at the time, to see whether it would assist in judging what was the meaning." The legacy cannot be satisfied out of the new 4 per cents.; that not being a fund which the testator contemplated by his will, the legacies would equally not be satisfied by a purchase in the 3½ per cents.; the act applies only to wills partly performed, it does not apply to those wills which had not been called into operation.

The Master of the Rolls. At the time the testator made his will there were two funds known by the name of the 4 per cent. bank annuities—one of 1780, and the other as the new 4 per cent. annuities; one of them having been created by the conversion of 5 per cents. to 4 per cents. Had they remained in the same state, the executors would have provided for the legacies in the one fund or the other; for the only ob-

* Before Sir T. Plumer, Jacob, 451.

† See 20th section of the act.

ject the testator had was with respect to the income, and it would be indifferent to the intention of the testator whether the investment was in the one fund or the other. Now one of these funds, that of 1780, is since gone, it having been converted into 3½ per cents.; but the destruction of that fund does not prevent the executors from making the investment in the remaining fund.

Decree that the investment of a sufficient part of the personal estate of the testator in the purchase of 12,500*l.* 4 per cent. bank annuities and 10,000*l.* 4 per cent. bank annuities be made in the fund called new 4 per cent. annuities,* and let the executors invest a sufficient part of the testator's personal estate in such purchase in their joint names.

There was another and very important question in the case, whether the trusts for the children of the daughter were not void for remoteness, but as to that his Honour would not decide; for if the daughters left no issue, the question might not arise, and he would not decide upon an hypothetical case.

But he decreed that the dividends of the 12,500*l.*, when purchased, should accumulate in the same stock for twenty-one years from the death of the testator, if Sarah Banks should so long live; and upon her death, or the expiration of twenty-one years, any of the parties interested in the said sum of 12,500*l.* were to be at liberty to apply; a similar decree, *mutatis mutandis*, was made as to the 10,000*l.*†

Reg. Lib. 1829. A. p. 806.

## Bourn *v.* Gibbs.

1 *Tamlyn*, 414.

Gift to a wife, and if she make no disposition of it, then over:
Held, an absolute gift.
*Westminster Hall*, June 17, 1830.

RICHARD CLARINGBOULD by his will gave and bequeathed as follows:—"Also, I give and bequeath the sum of 200*l.* stock, residue of my capital stock in the old joint stock South Sea annuities, and also the sum of 200*l.* capital stock in the three *per centum* consolidated bank annuities; and also all the rest and residue of my goods, chattels, effects, debts due and owing to me, money, securities for money, money in any of the public stocks or funds of the kingdom; and all other my

* This, of course, means the 4 per cents., that were reduced from the 5 per cents., and which since the decree have been reduced to 3½ per cent., and not the 4 per cents. 1826.

† The Thelluson Act, for restraining accumulations to twenty-one years, directs that the rents and produce of property directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to the person who would have been entitled if such accumulation had not been directed.

In the case of Griffiths and Vere, (9 Ves. 127,) a testatrix had directed an accumulation for a period which might extend beyond the time limited by the act, and it was held to be good *pro tanto*, and that during the period of twenty-one years the rents and profits were well directed to accumulate.

personal estate whatsoever and wheresoever, and of what kind or nature soever the same may be at the time of my decease, (from and after the payment of all my just debts, funeral expenses, the legacies before mentioned, and legacy of 5*l.* hereinafter bequeathed to my executor John May hereinafter mentioned, and the charges of proving and executing this my will,) unto my said wife Elizabeth Claringbould, to and for her own use and benefit; and to be at her own absolute disposal, and free from any control whatsoever: provided nevertheless, that if my said wife shall make no disposition thereof, either by expenditure, sale, transfer, assignment, gift, or otherwise, in her lifetime, or by her last will and testament, then I direct that the said several sums of 200*l.* of lawful money, and 1000*l.* stock in the old South Sea annuities, and 200*l.* stock in the three *per centum* consolidated bank annuities, and residuary personal estate, after such payments thereout as aforesaid, or such part thereof as shall remain undisposed of as aforesaid, shall, immediately after my said wife's decease, go to, and I accordingly give and bequeath the same unto my said two nephews Peter John Saunders and Thomas Saunders, and my said niece Ann Gibbs, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns; and I make, constitute, and appoint my said wife Elizabeth Claringbould, and Mr. John May of Deal, in the county of Kent, gentleman, executors of this my last will and testament." The question for decision in this cause was, whether the wife took an absolute interest under the will?

Mr Bickersteth and Mr Barber contended that this was an absolute gift, and cited the Attorney-General *v.* Hall, Fitzgibbon's Reports, 314; Bland *v.* Bland, 2 Cox, 349; Bull *v.* Kingston, 1 Merivale, 314.

Mr Pemberton said he did not deny that the widow had the power to make herself the absolute owner. She did not dispose of it by her will, or otherwise. The only question was, whether the widow had assumed to herself the right of ownership? There was nothing in this case to show that she had so done, and, consequently, the bequest over was good.

The Master of the Rolls. This is an absolute gift.*
Reg. Lib. 1829. A. p. 2182.

* This decision seems to have been made on the authority of the case of the Attorney-General on the relation of the Goldsmith's Company against Hall, as that case is reported by the reporter referred to; but his report of that case should be read with a note in the second volume of Equity Cases Abridged, which refers to a manuscript report of the case; and it seems that Francis Hall suffered a recovery of the freehold property, declared the uses to himself in fee, and then by his will devised it to his wife, and appointed her executrix. The recovery, although it could only affect the freehold, yet showed an *evident intention to acquire the dominion* of all the property devised by the father's will. (See Tamlyn on Terms of Years and other Chattels, title Executory Bequests, p. 86.)

However, the three judges who decided this case appear to have decided without reference to these circumstances. Their judgment is thus stated in the note:—

June 5, 1731.—King C., Jekylle Master of the Rolls, Reynold C. B.

In regard the ownership and property of the personal estate was vested in F. Hall,

## Between Philip Davies, plaintiff; and Thomas Thomas, and Elizabeth his wife, defendants.

1 *Tamlyn*, 416.

The plaintiff made a mortgage to the first husband of the female defendant, who after that husband's death lent the plaintiff the sum of 200*l.*; subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the plaintiff, and signed an agreement indorsed on the lease, that the plaintiff might re-purchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances not until distresses were levied: Held, that this was not a case of forfeiture, but of particular indulgence; from all the evidence the court was of opinion that the transactions were not contemporaneous, and the court held, that the terms not having been fulfilled, the bill must be dismissed, and with costs.

*Westminster Hall*, May 5, 1830.

PLAINTIFF being seised in fee of the lands in question, called *Retorno*, by indentures of lease and release, dated the 3d and 4th February 1818, conveyed the same unto Henry Twyning, his heirs and assigns, by way of mortgage, to secure 1200*l.* and interest.

The mortgagee subsequently by his will gave his estate and interest in the mortgaged hereditaments, and the money due on the mortgage, unto Elizabeth Twyning his wife, and appointed her his executrix. Afterwards, in 1820, the plaintiff became further indebted to Mrs Twyning in the sum of 200*l.*, and executed to her a warrant of attorney to confess judgment.

By indentures of lease and release of the 28th and 29th September, 1820, the plaintiff conveyed the property to Mrs Twyning. The consideration expressed was 1800*l.*, which included the two sums previously due.

By an indenture of demise, dated the 1st day of January 1821, Mrs Twyning demised the land to the plaintiff for a term of ninety-nine years, determinable on the deaths of plaintiff and his wife and son, and the survivor of them at the yearly rent of 105*l.*, payable half-yearly; and on such lease an agreement was endorsed, that in case the plaintiff should pay the half-year's rent due the 25th March on or be-

and *not the use only; the limitation to the company is void;* it is giving a man an estate in money to spend, and limiting over to another what does not happen to be spent; and therefore the information was dismissed.

In the case of Strange *v.* Barnard, 2 Br. Ch. Ca. 586. there was also evidence of intention. In that case, after a devise, under a power, of 300*l.* by a wife to her husband, and at his death the remaining part of what is left, that he does not want for his wants and use, to go over. The husband administered to his wife's effects, and called upon the trustees to transfer the 300*l.* to him, and it was decreed accordingly. There was then intendment, and it was carried into execution.

In Upwell *v.* Halsey, 1 P. W. Rep. 651, a testator directed that such part of his personal estate as his wife should leave of her subsistence should return to his sister. The widow married again, and it was argued that the marriage was a gift in law, but the bequest over was held good.

fore the 4th day of June then next following, and the half-years rent due on the 29th day of September on or before the 26th day of October then next following in every year, for the term of five years from the date thereof, if the lease should so long exist, then and upon the sole condition of the due payment of the rent half-yearly within the respective days aforesaid, Mrs Twyning thereby agreed to sell Retorno to the plaintiff, in case he should be desirous of purchasing the same, at any time within five years from the date thereof, but not afterwards, at the price or sum of 1850*l.*; but if default should be made in payment of the said rent half-yearly within the respective days aforesaid, this agreement should become, and it was agreed and declared between the parties that the same should be void and of no effect.

This agreement was signed by Mrs Twyning and the plaintiff, and witnessed by one Stephen Phillips.

In 1823 Mrs Twyning married the defendant Thomas Thomas.

The bill prayed that the plaintiff might be let in to redeem, or that he might be declared entitled, under the clause of repurchase, to have a reconveyance, upon such terms as the court might deem just.

The defendant Elizabeth Thomas, by her answer, said, that some months after she became the purchaser, the plaintiff proposed to become the tenant, and that she should agree that he might repurchase according to the memorandum; but this defendant said that the said lease and the memorandum formed no part of the consideration for the conveyance, and were not part of such transaction; but that the lease and memorandum were a totally distinct, separate, and subsequent transaction, and the same were not even proposed or contemplated at the time, nor till some months after the said absolute sale and conveyance had been completed and executed as aforesaid. And the defendant said that the rent had not been paid according to the memorandum; that the plaintiff had given bills for several sums of rent, which had been dishonoured, and were then due.

One witness for the plaintiff proved that, at the execution of the conveyance, Mrs Twyning said that if the plaintiff would repay her the purchase-money in five years he might have the lands back again; but a witness examined on behalf of the defendants swore that he was present at the execution of the conveyance, and that nothing was then said as to Mrs Twyning giving back the property on any terms whatever. Another witness for the plaintiff proved a tender to Mrs Thomas in her dwelling-house, on the 25th January 1825, of 1965*l.*, being the full principal and interest due on the mortgage.

It appeared by the evidence for the plaintiff that, on the 10th November 1824, the defendant Thomas Thomas received the sum of 121*l.* 15*s.* 4*d.*, being the proceeds of a sale made under a distress for arrears of rent due on the 29th of the preceding September; and a witness proved that he was present on the 11th December 1824, when notice was given on behalf of the complainant to the defendant Thomas Thomas of his intention to avail himself of the memorandum to repurchase.

A witness for the defendants, an auctioneer, proved the taking of a distress for recovery of arrears of rent, and that the plaintiff then desired him to surrender his lease, as he had nothing else to do; and

plaintiff then delivered the lease to the witness, who delivered it to Mrs Thomas's agent to be surrendered to her.

The evidence as to value was conflicting.

Mr Pemberton and Mr T. Parker for the plaintiff.

In the cases of Mellor *v.* Lees, 2 Atk. 494, Willett *v.* Winnill, 1 Vernon, 488, and Floyer *v.* Lavington, 1 P. Wms. 268, the principle of redemption was recognized: it is immaterial, that the shape of the transaction is that of purchase and power to repurchase; it is the same as a mortgage with power to redeem: the purchase money was not the value: and there is sufficient made out to entitle the plaintiff to redeem. Is he not to be allowed to repurchase because he was a little behind hand, because the rent was not paid at the very day?

The Master of the Rolls. I think the only material question here is, whether the plaintiff is entitled to repurchase?

Mr Bickersteth for the defendants.

The rent was not regularly paid, in some cases not until distresses were levied. By the express terms of the contract, *time* is made the essence of the contract; the plaintiff then is not in a situation to call on the defendants for specific performance; time is the essence of this contract.

Mr Pemberton in reply.

There can be no distinction between a mortgage with a right to redeem, and a conveyance with a power to repurchase, they both operate as a security: this is a conveyance with a right to repurchase.

The Master of the Rolls. This is not forfeiture: a particular indulgence is given to the plaintiff, provided certain payments are made at particular times. Is it not like a condition in a mortgage at 5 per cent., that on payment of 4 per cent. at a certain time that shall be a good payment of interest? The debtor is not entitled to a reduction of interest unless payment be made at the time mentioned. It is not proved that these transactions were contemporaneous: the evidence on the part of the defendants proves the contrary. I am clearly of opinion, upon the evidence, that they were not contemporaneous; and I should have doubted the conclusion of law if they had been so.

I will look into the question of repurchase. The question is, whether it comes within the principle of forfeiture, or within the principle of indulgence?—*Cur. adv. vult.*

*May* 18.—His honour gave judgment, dismissing the bill with costs.

Reg. Lib. 1829. A. p. 1424.

## Champion *v.* Rigby.

1 *Tamlyn*, 421.

A solicitor having purchased a property of his client at an under-value, the client eighteen years afterwards brought his bill to set aside the sale.

The court was of opinion that a solicitor dealing with his client was bound to show that he had given his client the price which he would have advised him to accept from another person; but the plaintiff having failed to show that he was not in a situation during the time which had elapsed to seek relief, the court dismissed the bill, but without costs.

*Semble.* Had the plaintiff applied to the court in a reasonable time, or had the court been satisfied by evidence of his total inability to take proceedings in this court, he would have had relief.

*Rolls*, May 19, 21, 1830.

THE defendant was a solicitor, and had acted as such for the plaintiff.

In 1810 the plaintiff was possessed of a wharf, which, in the division of his father's property in 1799, was valued at 700*l.* The plaintiff also purchased a leasehold house and warehouse in Thames street, subject to an under-lease for 1370*l.*, and then purchased the under-lease for 675*l.* The defendant was concerned for him as his attorney in these transactions.

The plaintiff became embarrassed, and the defendant purchased this property from him for 1400*l.*

Witnesses for the plaintiff proved that the property was in 1810 worth 2430*l.*

The evidence on the part of the plaintiff went to show that the plaintiff was in embarrassed circumstances from the time of the sale up to 1824; but by the answer, the defendant stated that the plaintiff received a considerable accession of fortune on the death of his mother, a few years after the sale, and kept saddle and sporting horses.

The bill was filed in 1828.

Mr Bickersteth and Mr Young for the plaintiff.

The court must interfere to protect clients from the conduct of their solicitors.

It is the duty of a solicitor, who purchases from his client, to show that he has given an adequate consideration; in this it was clearly inadequate. It is evident that, during the whole transaction, advantage was taken by the defendant of the plaintiff, and of the influence which, as the plaintiff's solicitor, he possessed.

Mr Tinney and Mr Pemberton for the defendant.

Where a client comes to a solicitor and offers a property for sale, that solicitor does not come within the rule of a purchase by a client from a solicitor, the transaction being independent of the connection between attorney and client, he not being the attorney in *hâc re*. Montesquieu *v.* Sandys, 18 Ves. 313, Cane *v.* Lord Allen, 2 Dow, 289, Gibson *v.*

Jeyes, 6 Ves. 266. The case before the court is a single transaction of purchase and sale. The remaining question is, whether at a distance of eighteen years this transaction ought to be set aside? A person applying to this court ought to show diligence and despatch: it it not fair to call upon a person to defend his conduct at that distance of time. For eighteen years the defendant has been allowed to consider this as a part of his income, spending it on his own family. After so long a time, the plaintiff can not come into a court of equity, unless it can be shown that he had ever since laboured under the same disability which first led him into the transaction; but there is no evidence to that effect; there is evidence of his having subsequently possessed abundant means. We prove his receipt of large sums.

The Master of the Rolls. The receipt of sums is nothing; for a man may have demands upon him to ten times the amount.

Mr Pemberton read a passage from the defendant's answer, that the plaintiff had kept saddle and other sporting horses, and was lately the owner of, and about to run a horse, so that defendant believed the plaintiff could not have delayed instituting proceedings against the defendant for want of proper means.

The Master of the Rolls. Then the defendant has by his answer rendered it necessary that the plaintiff should show why he did not proceed sooner.

Mr Pemberton. Due vigilance ought to be evinced by a party who applies for the extraordinary aid of this court. In Gregory v. Gregory, Cooper, 201; a suit, after a lapse of eighteen years, was dismissed. Purcell v. Macnamara, 14 Ves. 90. Ignorance on the part of the plaintiff there was none; he knew the value of the property well; difficulty in pursuing his remedy he had none, for he had sufficient means, and he consulted a solicitor. The premises are now pulled down, so that their former state is quite a matter of conjecture; and those who could give evidence in the plaintiff's favour have died one after the other. I trust your honour will be of opinion, that however questionable this transaction might have been originally, still, that, after the lapse of eighteen years, the plaintiff is not entitled to come here and seek relief.

Mr Pemberton was about to read evidence.

The Master of the Rolls. I had better call upon the plaintiff. The only difficulty is the point as to the time which has elapsed.

Mr Bickersteth then read evidence to explain that the plaintiff did not proceed sooner from the state of his circumstances; and which stated, that the plaintiff was in a state of embarrassment down to 1824.

The Master of the Rolls. The question is, whether what has been proved accounts for doing nothing for eighteen years, and whether a court of equity should interfere after this lapse of eighteen years?

[Champion *v.* Rigby.]

I am of opinion that a court of equity ought not to interfere, unless the plaintiff can show that he had not been in a situation to seek relief.

Mere evidence of embarrassment is not sufficient; the plaintiff in this case had opulent relations.

I am of opinion, that a solicitor dealing with his client is bound to show that he has given his client the price which he would have advised his client to accept from another person.

I am of opinion, that that was not the case here; but the plaintiff has not applied in time, nor accounted for the delay.

Bill dismissed, but without costs.

## Walsh *v.* Wallinger.

1 *Tamlyn*, 425.

A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would *give and bequeath* the same to her children by him, as she should appoint. The widow, by will, made an appointment to five of her seven daughters:

Held, that the appointment was void, all the children being entitled to the benefit of the fund:

Held that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not take any part of the fund.

*Rolls*, December 2, 1830.

J. W. A. WALLINGER, by his will, dated the 19th January 1805, gave unto his wife Matilda all his personal estate and effects for her sole use; and he gave and devised unto his brother, Joseph Wallinger, William Baldwin, and William Turner, and their heirs, his estate called Hare Hall, and other lands, and all other his real estate, in trust to sell and dispose of the same as soon as conveniently might be after his decease, and after deducting the costs, and the payment of all incumbrances and his just debts, to pay the residue thereof unto his wife, to and for her own use, benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son, and at her decease give and bequeath the same to her children by him, in such manner as she should appoint. And the testator appointed his wife and the said three trustees executors of his will. The testator left one son and eight daughters by his said wife. The widow and W. Turner proved the will, the other two executors renounced the probate, but all three trustees took upon themselves the execution of the trust. By a deed, dated the 29th March 1805, Matilda Wallinger, the widow, released unto the trustees all her right and interest in or to the residue of the moneys to arise by sale of the real estate devised by the testator in trust to be sold, but nevertheless upon such trusts as the same would have been subject to in the hands of the said Matilda Wallinger, widow of the said testator, if he instead of expressing himself as trusting, or intimating that his said trustees should trust, that his said wife would thereout provide for and maintain his family, and particularly his only

son; and at her decease, give and bequeath the same to her children by him, in such manner as she should appoint, had in and by his said will imperatively directed her, the said Matilda Wallinger, widow, during her life, out of the interest of the said residue, to provide for and maintain his children, and particularly his only son, and at her decease to give and bequeath the whole of the residue to her children by him, in such manner as she should appoint.

The real estates were sold, and in February 1815, there was standing in the name of Joseph Wallinger, the surviving trustee, the sum of 2508*l.* 3 per cent. consols; of which, by indenture dated the 4th February 1817, in pursuance of the power remaining in her by virtue of the said will and of the indenture of the 29th March 1805, she appointed the trustee to sell out so much stock as would produce 1000*l.*, and pay it to her son, J. A. Wallinger, for his sole and separate use, and he thereby agreed that he should not be entitled to any further share, unless his mother by deed or will made a further appointment in his favour:* and on the 15th February 1817, the son entered into a covenant to pay his mother 5 per cent. on the 1000*l.* during her life.

Caroline Wallinger, one of the daughters, died in June 1828, and John Arnold Wallinger took out administration to her effects.

Mrs Matilda Wallinger made her will, bearing date the 13th May 1828, as follows:—"This is the last will and testament of me, Matilda Wallinger, at Nice, and as I mentioned in my will bearing date the 30th March 1805:—My daughter Elizabeth Franciska being amply provided for by the late Mr Fisher of Ealing Park, that she was not to have any share of my property, and I wish it to be understood that it must remain so; likewise Anna Maria Daniel, my eldest daughter, is not to have any share in any of my property, being likewise well provided for; likewise my son John Arnold Wallinger having had 1000*l.* of me, which was thought an ample share, and as much as could be spared from my daughters, but I now bequeath to him 50*l.* for mourning. I do hereby direct and appoint that the residue of such trust moneys as are in the stocks, funds, or securities and annuities, shall be shared alike between my daughters, Matilda Wallinger, Charlotte Wallinger, Mary Anne Wallinger, Harriett Wallinger, Louisa Wallinger, in equal shares and proportions, and share and share alike."

Mrs Wallinger died in May 1829, and left her son and seven of her daughters, of whom six were married, surviving her. At the time of her will and death the trust-fund amounted to 7276*l.* 3 per cent. reduced annuities, and 935*l.* 3 per cent. consols, standing in the name of Joseph Wallinger, who died in December 1827, having appointed A. M. Wallinger, his widow, executrix thereof.

This bill was brought by the five daughters, to whom the property was appointed by the will of Matilda Wallinger, submitting that her will was a good execution of the power of the will of the husband, and of the indenture of the 29th March 1805, and that the stock ought to be sold and divided amongst them.

By the answers it was submitted that the will of the testatrix was void as to the trust fund, by reason of her having appointed no part

* There was no attempt to disturb this, the sum appointed being about what the son would have received under the principle of the judgment given.

amongst the defendants Anna Maria Daniel, Elizabeth Franciska Roberts, or Caroline Wallinger deceased, or her representatives; and the son claimed to have a distributive proportion to make up the 1000*l.* received by him out of the trust fund equal in amount to the shares of the other claimants.

Mr Pemberton and Mr Longley, for the plaintiffs, argued that the words of the will of the testatrix being "in such manner as she shall appoint," show that she was to have a large discretion, and cited Burrell *v.* Burrell, Ambl. 660, before Lord Camden, Civil *v.* Rich, 1 Ch. Ca. 309, and Lord Alvanley's observations on Burrell *v.* Burrell in Kemp *v.* Kemp, 5 Ves. 849, and in Spencer *v.* Spencer, 5 Ves. 362, and referred to the principles sanctioned by stat. 1 W. 4 c. 46.

Mr Tinney and Mr Temple for defendants, the two daughters not provided for by their mother's will, and who survived her. Burrell *v.* Burrell was apologised for by Lord Alvanley; Gibson *v.* Kinver, 1 Vern. 66, is a case the courts have come back to.

Mr Bickersteth for John Arnold Wallinger, the administrator of Caroline Wallinger. This is not confined to a trust for children living at the death of Mrs Wallinger. The words of the will, "in such manner," must be considered as pointing to the shares or proportions. The authority of Burrell *v.* Burrell has been doubted. Vanderzee *v.* Alcom, 4 Ves. 770.

Mr Pemberton in reply. In Kemp *v.* Kemp the word "amongst" was the ground of the decision. Gibson *v.* Kinver is not reconcilable with Burrell *v.* Burrell. Gibson *v.* Kinver was an early case. Unless Burrell *v.* Burrell is to be overruled, your honour will not hold the power to be ill executed. The whole doctrine is extremely artificial, and will now, fortunately for the ends of justice, be entirely swept away.

The Master of the Rolls. The decisions are to be followed as precedents. The testator gave the residue to his wife, trusting that, at her decease, she would give and bequeath the same to her children by him. Do the words "in such manner as she shall appoint" mean a right to exclude any? Under such words it has been decided that all the children should take. All children capable of taking by gift and bequest of the mother take an interest here. John Arnold Wallinger has excluded himself, and can take nothing.

*Dec.* 6.—Mr Pemberton and Mr Longley.

The remaining question is, whether a representative of a deceased child can take a share in default of appointment? There are two recent decisions, which clearly establish that such representatives can not take. Kennedy *v.* Kingston, 2 Jac. & Walk. 431, Needham *v.* Smith, 4 Russ. 318; and there are no cases contrary to these decisions. The words "*do*," "*lego*,"—"I give and bequeath," are usual testamentary phrases; and the testator in this case having empowered his wife to give and bequeath, could only have contemplated a disposition by her by will, and only such children could take under her will as might sur-

vive her. Doe dem. Thorley *v.* Thorley, 10 East. 438; and Justinian's Institutes, lib. 2. tit. 20, par. 30, 31.

Mr Tinney and Mr Temple for the other parties in the same interest.

Mr Bickersteth for the administrator of Caroline Wallinger.

The children took a vested interest, and the widow a power of appointment. The mode of divesting that interest was an actual appointment by the widow. She had it in her power to make a provision in her lifetime, as she in part did for John Wallinger, 1 Roper on Legacies, 537. Boyle *v.* Bishop of Peterborough, 1 Ves. jun. 299, Butcher *v.* Butcher, 1 V. & B. 90, Malim *v.* Keightley, 2 Ves. jun. 333, Malim *v.* Barker, 3 Ves. jun. 150, Grace *v.* Wilson, Rolls MS. October 1811; Sugden on Powers, 210. 2d edit. It is immaterial whether done by deed or will, the interest being vested, subject only to be divested by an execution of the power. The question was, whether the lady, upon the marriage of any of her children, could make a settlement? Could she not, as she did, upon the son setting up in business, when she made him an advance of 1000*l.*? The will is a bad appointment, for it excludes two of the children, who were living at the death. There is no case like this in its circumstances, yet upon the general principle of a vested interest, liable to be divested by the execution of a power, and that execution having failed by the execution being imperfect, the interest has not divested.

Mr Cooke with Mr Bickersteth.

Every object of the power took a vested interest, and in the event of any of them dying during the life of the donee of the power, the share of the person dying went to that person's next of kin.

The Master of the Rolls. The question is, whether this is a general power, or a power limited in the mode of execution to a will? I hold the words "give and bequeath" are only testamentary, and the power given could only be executed by will. The words of the will do not give a vested interest to the children, consequently the representative of Caroline Wallinger, who died before her mother, could not take, and those only could take who survived the donee of the power.

Declare, that under the will of J. W. A. Wallinger, the wife had virtually an estate for life only in the residue, with a power of appointment by her will only; that the words "give and bequeath" were testamentary; that consequently only children alive at the death of the wife could have taken under her appointment; and only such children could take (they having no vested interest in them in the wife's lifetime under the testator's will,) in default of appointment. Hence, that Caroline Wallinger, who died in her mother's lifetime, had no vested interest, and defendant John Wallinger, her representative, can take nothing in her right.

Costs of all parties out of the estate. Costs of Mrs A. M. Wallinger the trustee, as between solicitor and client, including her previous reasonable expenses relating to the trusts.

Decree, that the appointment of the trust-fund made by the will of Matilda Wallinger is void, and that the trust-funds are divisible between the only children of John Wallinger Arnold Wallinger, Esq.,

[Walsh *v.* Wallinger.]

deceased, the testator in the pleadings named, who were living at the time of the death of the said Matilda Wallinger (except the defendant John Arnold Wallinger), in equal seventh parts. The decree went on to order, that some of the married ladies who resided abroad should attend certain persons named in the decree, to be examined as to the disposal of their shares.

Reg. Lib. 1829. B. p. 513.

## Fosbrooke *v.* Balguy and others.

1 *Tamlyn*, 433.

The eighth of Lord Lyndhurst's orders applies only to the answer to exceptions.

*Westminster Hall*, June 21, 1830.

## Between Sir Charles Cockerell, Bart., Henry Trail, Sir Charles Richard Blount, Bart., the most noble George Duke of Marlborough, and James Blackstone, LL.D., plaintiffs; and Francis Cholmeley, Esq, defendant.

1 *Tamlyn*, 435.

Sir H. E. by his will, devised his lands to trustees, to the use of his eldest son for life, sans waste, and in strict settlement, with remainders over, under which the defendant ultimately became tenant in tail in possession; and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed, exclusive of the timber, which was to be valued, and the amount of the valuation paid to the tenant for life. By the conveyances, the surviving trustee, in consideration of the price fixed, conveyed the land to the purchaser: and the tenant for life, in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser:

Held, that this was a bad execution of the power in a court of equity.

The plaintiff having endeavoured to show that there was in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the court to aid the execution of the power, but the court being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intentions of the parties refused to aid the execution of the power:

Held, that acquiescence in a transaction can not be maintained unless it be shown that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest.

*Rolls*, March 16, 1830.

SIR HENRY ENGLEFIELD by his will, on the 27th day of November 1778, gave the manor of Early, and his manor and mansion-

house called White Knights, and all and every his messuages, lands, tenements, wood-grounds, rents, tithes, and hereditaments, situate in the parish of Sonning St. Giles's, in Reading, and Englefield, or elsewhere in the county of Bucks, unto Lord Cadogan and Sir Charles Bucke, and to their heirs, to the use of his son Henry Charles Englefield for life, sans waste and in strict settlement; remainder in his second son Francis Michael Englefield, in strict settlement; remainder to testator's daughter Teresa Anne Englefield, in strict settlement; with divers remainders over. And the said testator by his will declared that it should be lawful for the trustees, or the survivor of them, or the heirs of such survivor, from time to time and at all times during the lives of H. C. Englefield, F. M. Englefield, and T. A. Englefield, or during the life or lives of any or either of them, at the request and by the direction or appointment of the person who for the time being should be in possession of or entitled to the rents and profits of the said manor and tenements by virtue of the limitations therein contained, signified by any deed or writing, deeds or writings, under hand and seal, attested by two witnesses, to make sale and dispose of all or any part or parts of the manor and tenements aforesaid to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or in any other equivalent, as to the trustees should seem just and reasonable; and to that end for the trustees by deed or writing under their hands and seals, sealed and delivered in the presence of two or more witnesses, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, and appoint the manor and tenements aforesaid, whereof the uses should be revoked either unto such purchaser or purchasers, his, her, or their heirs, or otherwise to limit such new or other use or uses as should be requisite; and upon payment and receipt of the money arising from the sale, to give and sign proper receipts, which should be sufficient discharges. The purchase-money to be laid out by the trustees, with the like consent, in the purchase of other lands, to be settled to the like uses; and in the meantime to be placed out on real or government security.

In 1782 Teresa Anne Englefield married, and the defendant Francis Cholmeley is her eldest son, and the first tenant in tail.

The bill stated the preceding facts, and that William Byam Martin, Esq. having caused an application to be made to Joseph Pearson, the solicitor of Sir Henry Charles Englefield, for the purchase of the manor, mansion-house, and premises, he wrote to Sir Henry upon the subject, and Sir Henry by letter answered Mr Pearson, that the price was 12,000 guineas, exclusive of the timber, which at a fair valuation, he fancied, would come to 2000 more. Ultimately, after a great number of letters had passed, Mr Martin acceded to the proposition; but the furniture was to be included in the 12,000 guineas. Mr Martin was to have the manorial rights, but not the ground or soil of the commons and lands not purchased. And Mr Martin also agreed to buy the *Foxholds*, *other parts of the premises* devised by the will, for 800*l.*; so that the purchase-money amounted to 13,400*l.*; and the timber was valued at 2446*l.* 7*s.* 6*d.*

Sir H. C. Englefield communicated this to Lord Cadogan, the surviving trustee, and requested him to revoke the uses and convey the

property to Mr Martin, for the considerations aforesaid; and Lord Cadogan approved of, consented to, and adopted the agreement,* and undertook and agreed to execute the necessary deeds for carrying the same into execution, but it was agreed that the value of the timber should be paid to Sir H. C. Englefield for his own use. An indenture, bearing date the 12th of May 1783, was then made and executed, which recited that Lord Cadogan by virtue of the power in the will, at the request and by the direction of Sir H. C. Englefield testified by that writing under his hand and seal, had contracted and agreed with Mr Martin for the sale to him of the manor of White Knights, with the rights, royalties, manors, and appurtenances thereto belonging, except as thereinafter is excepted, and also the capital mansion and mansion-house called White Knights, with the outhouses, edifices, yards, gardens, orchards, and other appurtenances thereto belonging; and the fixtures, household goods, furniture, garden tools, implements, and utensils in and about the same, and of the messuage, park, lands, tithes, and hereditaments in the parishes of Soning and St. Giles's in the county of Berks, at the price of 13,400*l.*; and that the said Sir H. C. Englefield, who, as tenant for life, without impeachment of waste, was entitled to the timber and trees standing and growing and being on the said premises so agreed to be sold to the said W. B. Martin, had agreed to sell the said timber and timber trees unto the said W. B. Martin for 2148*l.* By this deed Lord Cadogan in consideration of 13,400*l.* with the required consent, revoked the uses created by the will, and limited and appointed the premises unto W. B. Martin and Martin York, and their heirs, to the use of them and the heirs and assigns of Martin York. But nevertheless as to the estate of Martin York, his heirs, and assigns, in trust for W. B. Martin, his heirs, and assigns. By a further witnessing part Lord Cadogan and Sir H. C. Englefield and Dame Katherine Englefield granted unto W. B. Martin and Martin York the manor of White Knights, &c. (save the ground and soil of the commons, waste lands, and other commonable places within the manor, and the right of depasturing cattle on the same, in respect of the other hereditaments devised by the will, and all timber on the said commons, and also any allotment which upon an enclosure of the commons might be made of the manor of White Knights.) To hold as in the appointment.

By a further witnessing part, Sir H. C. Englefield in consideration of 2448*l.*, conveyed the timber and fruit trees, to hold in like manner: and by another witnessing part, in consideration of the 13,400*l.* paid to Lord Cadogan, Sir H. C. Englefield assigned the fixtures, household goods, furniture, implements, utensils, and other moveables in and about the premises unto W. B. Martin, his executors and assigns.

Some doubts having arisen about the transaction as to the timber, the sum of 2448*l.*, and the dividends thereon, amounting altogether to the sum of 3681*l.* 4*s.* 3*d.* were by Sir H. C. Englefield transferred to Lord Cadogan upon the trusts of the will.

The estates so purchased by Mr Martin became vested in the Duke of Marlborough, (then Marquis of Blandford,) Thomas Coutts, and James Blackstone, in trust for W. B. Martin, and they by indentures

* The defendant by his answer, alleged that Lord Cadogan did not interfere with the sale of the timber, or judge of the reasonableness of its price.

bearing date the 13th and 14th of February 1814, mortgaged the property in fee to Archibald Paxton, Sir William Paxton, Sir Charles Cockerell, and Henry Trail, to secure 45,000*l.* advanced and lent to the Duke of Marlborough, with interest.

By a deed dated the 10th of November 1814, the Duke of Marlborough further mortgaged the property to Sir Charles Cockerell to secure 20,000*l.* navy five per cents. and the dividends.

Lord Cadogan having died, leaving his eldest son a lunatic, an act of parliament was passed appointing new trustees, and in that act the sale to Mr Martin was recited, and the moneys and securities in which the purchase-money was invested were directed to be transferred to the new trustees.

The sum of 4282*l.* 14*s.* 9*d.*, part thereof (and which included the purchase-money of the timber,) was, in November 1819, sold out with the privity of the defendant, and with his consent applied in defraying the costs of the act of parliament, the expenses of enclosure and exchange of other lands devised by the will; and other charges relating to the trust estates. Some part of the purchase-money had been previously applied to the purchase of land-tax of other estates of Sir H. Englefield.

Under a decree in a suit in Chancery, wherein Mr Paxton and his co-mortgagees were plaintiffs, and the trustees of Mr Martin were defendants, the property purchased by Mr Martin was sold to the plaintiff, Sir Charles Richard Blount, for 37,000*l.*

By the death of Sir H. C. Englefield, the first tenant for life, without issue in 1822, (the second son of the settlor having previously died without issue, and Teresa Anne, the daughter of the settlor, having died on the 3d of October 1810,) the defendant, the son of Teresa Anne, who was of age in June 1804, became tenant in tail in possession; and in July 1822, presented a petition to the Master of the Rolls, setting forth the sale to Mr Martin, and the said application of the sum of 4282*l.* 14*s.* 9*d.*, and praying that the trustees might be directed to assign the sum of 12,500*l.*, and another small sum, both the purchase-moneys of Mr Martin to the petitioner, and after a reference to the Master, an order was made accordingly.

The bill then stated, that in Michaelmas term 1823, the defendant brought his writ of *formedon*, and the question therein was, whether, according to the legal construction of the will of Sir Henry Englefield, and of the indenture of the 12th May 1783; the power was well executed; whereon the court of common pleas decided, that Lord Cadogan having by that deed intended to convey the property without the timber, the deed was void, and judgment was given for the demandant.

The bill charged confirmation, and prayed that the defect in the execution of this power might be supplied.

The defendant by his answer alleged, that in consenting to the act of parliament and in petitioning the rolls, he was entirely ignorant of the indenture of the 12th May 1783, or the nature or effect thereof, and of the manner in which the power of sale was exercised, and the estate and timber conveyed.

Mr Pemberton and Mr Cockerell for the plaintiffs.
Mr Bickersteth and Mr Lynch for the defendant.

[Cockerell *v.* Cholmeley.]

The court put the plaintiffs to their election to abandon the writ of error pending in the House of Lords from a judgment in the court of law. And Mr Pemberton having elected so to do, the court allowed the cause to proceed.

The Master of the Rolls. This is a most unfortunate case; the plaintiffs and the persons under whom they claim have acted with perfect fairness and integrity.

The question in this cause is, whether the power of sale is or is not well executed in the consideration of a court of equity, it having been already determined by a court of law that this power has not been well executed.

Powers generally require certain formalities in the mode of execution; and if there be a valuable consideration, this court will aid the defective execution of a power.

The first inquiry is, whether a trustee for the sale of an estate can convey it with the exception of the timber? The court of law has determined that no such conveyance can be made, and that this therefore is no execution of the power; and if it were competent to this court to give any opinion upon the subject, I must concur in the judgment which has been given at law.

The court of law has determined what is perfectly plain, that Sir Henry Charles Englefield could have no right to the sum of 2448*l.*, the price of the timber; and that the conveyance by the trustee, Lord Cadogan, was therefore a conveyance which had no operation, as not being a conveyance under the power. In the opening of this case two grounds were taken upon which the plaintiff considered that he might be entitled to relief in a court of equity.

The first ground was, that prior to the conveyance so executed by Lord Cadogan and Sir Henry Englefield, there had been an agreement in writing which purported to be an agreement made on the part of Sir Byum Martin, not for the purchase of the land without the timber of Lord Cadogan and the timber of Sir Henry C. Englefield, but a contract made with Sir Henry C. Englefield for the purchase of the whole estate, including the timber; and it was contended that there being such an agreement in writing prior to the execution of the deed, that a ground might be found for correcting the deed, which did not give effect to the contract as stated. Unfortunately it appears to me that there was no such contract in writing, and that the argument therefore that was built upon the foundation of such a contract must, in my view of the case, totally fail. The next ground adopted in the argument was, that there was plainly here a mistake in the deed; that the deed was drawn contrary to that which was the real substance of the transaction. I perfectly agree that there is a great mistake in the deed; that is to say, that the parties to the deed have misapprehended the effect of the law which applied to this transaction; but a court of equity has no jurisdiction to correct a mistake in an instrument where the parties have proceeded upon error in point of law. The only jurisdiction a court of equity has for correcting mistakes in deeds is where the drawer of the deed, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed. Now there is no ground to say that the parties to this deed had not that intention which is expressed upon this deed. This deed

recites a contract made with Lord Cadogan for the purchase of the land with the exception of the timber. It recites a contract made with Sir Henry C. Englefield for the value of the timber. It states the payment of the different considerations, and contains upon the face of it an express acknowledgment by Lord Cadogan, and Sir Henry C. Englefield respectively, that they did respectively receive the several considerations stated in the deed. I can not consider, therefore, that this, founded certainly on mistake, was founded on the mere mistake of the drawer of the deed. It was certainly the intention of the parties that this deed should be so framed, not from any mistake of the drawer, but because the parties misunderstood the nature of their rights. Sir B. Martin paid to Sir H. C. Englefield the amount of the value of the timber. He must have intended, therefore, to have received from Sir H. C. Englefield the conveyance of that timber for which he paid. This, in truth, substantially disposes of the case.

It is said there are other grounds—the acquiescence on the part of Mr Cholmeley, who came of age in 1804, and who, by notice from his agent, was informed of this transaction, and was informed that Sir H. C. Englefield had purchased as much stock as the 2448*l.*, the value of the timber, would have produced at the time of the transaction. I take it for granted this was the case, but did Mr Cholmeley know that the effect of that transaction was, that there had been no valid execution of the power, and that the estate remained subject to the trust of old Sir H. Englefield's will? If he did not know this, the notice to him was wholly out of the question. No man can confirm a transaction prejudicial to his interest, unless he is apprised, not only of the fact but of the law. There is no pretence here to say, that Mr Cholmeley, when he received the notice with respect to the facts, had the least information given to him, or the least knowledge that the effect of the transaction was to leave in him the benefit of the remainder limited to him by Sir H. Englefield's will.

How can it be charged upon Mr Cholmeley that he has been guilty of any acquiescence in point of time? His right accrued in 1822, and in 1823 a writ of formedon was issued, upon which he obtained the opinion of the court of law in his favour. In the year 1819, my Lord Cadogan being dead, and the heir-at-law, to whom the trusts under the will of Sir Henry Englefield descended, being a lunatic, it was thought proper, inasmuch as there were very large estates depending upon those trusts, to apply to parliament in order to have new trustees appointed in the place of the lunatic heir. Mr Cholmeley, in respect of his remainder in this estate, was called upon to join in the petition to parliament for that purpose, and he accordingly joined, and he consented to the act of parliament. Now, is it possible that Mr Cholmeley's consent, in this manner, could affect his interest, unless he was at the time apprised of the error in law which had been committed, and which left that interest in him? I am of opinion, that, being at the time wholly ignorant of rights which were in him, his acquiescence operated nothing with respect to this defect. Now these are all the grounds upon which this case has been argued, and I am bound, therefore, to dismiss this bill; but, considering the circumstances of the case, it would indeed be a great hardship to dismiss it with costs. The circumstances are perhaps the most hard that have ever been known to occur in any court of

justice; and I am glad to hear from the counsel on the part of the defendant, that with respect to the return of the money paid, the defendant is disposed, without further litigation, to return the 12,500*l.*, and to pay a proportion of the expense attending the appointment of new trustees, rateably according to the relative value of the property in question at the time at which it was sold.*

Decree, that the plaintiff's bill be dismissed without costs.

Reg. Lib. 1829. A. p. 1534.

## Hobson *v.* Neale.

1 *Tamlyn*, 446.

A purchaser entitled to title deeds having paid his purchase-money into court, the court will not order the money to be divided, and the deeds to remain in the hands of the Master until the completion of the sale of another lot.

February 15, 1830.

THIS cause was set down by the plaintiff on further directions, for the purpose of obtaining an order, of the court, that the purchase-money, which had been paid into court by the purchaser of the largest lot might be distributed amongst the parties entitled to the fund in the cause. The real estate had been advertised for sale in fourteen lots; the purchaser of the largest lot was to have possession of the title-deeds, and to covenant to produce them. The fourteenth lot remained unsold.

Mr Wilbraham, for the plaintiff, contended, that the deeds ought to remain in the Master's office until all the lots were sold, and that in the mean time this order might be made.

Mr Barber, for the purchaser of the largest lot, argued, that it was not competent to the court to make any such order, for that without the title-deeds the purchaser would not have the full benefit of his bargain; and without them he could neither settle or mortgage satisfactorily. On the delivery of the title-deeds to him he was quite ready to enter into covenants for their production, and to give an undertaking to enter into such covenant with the purchaser of lot 14, whenever it should be sold.

The Master of the Rolls would not make any order, and gave the purchaser his costs.

* Some further explanation took place as to this, and it appeared to be undertaken by the counsel for Mr Cholmeley, that he should reinstate the purchaser, as far as he could, in the situation he would have been had not the purchase been made; this, however, formed no part of the decree, and it was difficult to collect what was really intended, nor is it material to the principle of the decision.

**Elizabeth Watkins and Virginia Watkins, spinsters, plaintiffs; and Joseph Lewis, William Jones, John Price Martin, William Lucas and Sarah Janetta his wife, Richard Constable, John Constable, Richard Owen Stone, William Owen Stone, and Sarah Oliphant, defendants.**

1 *Tamlyn*, 447.

Land purchased by the husband, subject to a mortgage, with the money of a half sister of the wife, was on her marriage settled on the husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the son being dead, the widow also levied a fine: Held, that the property was not within the spirit of the statute of 11 H. 7. c. 20.; and that the plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations of the widow.
*Rolls*, Feb. 23, 1829.

BY indentures of lease and release, dated the 28th and 29th January 1755, between Elizabeth Hughes and Letitia Hughes, of the one part, and William Watkins of the other part, reciting that William Watkins had contracted and agreed for the purchase and hereditaments called Gelly Vaur Gelly Vach, the Paint and the Pack House, in the county of Monmouth, for 2480*l.* 10*s.*, and that he was thereout to pay a mortgage debt of 1500*l.* thereon, and to pay 980*l.* 10*s.* to the said Elizabeth Hughes and Letitia Hughes, who, in consideration thereof, bargained, sold, released, and conveyed unto the said William Watkins, his heirs and assigns, the same hereditaments and premises. A receipt is indorsed for the 980*l.* 10*s.*

By other indentures of lease and release, dated the 24th and 25th April 1755, between the said William Watkins and Philadelphia his wife of the first part, Ann Constable, spinster, and sister-in-law of the said Philadelphia, of the second part, and Thomas Symons of the third part, reciting that the purchase was made by William Watkins, with the approbation of Ann Constable, who had advanced to him the sum of 980*l.* 10*s.* for the purchase thereof, upon condition that the said estates should be settled to the uses thereinafter mentioned; he, William Watkins, granted, released, and confirmed unto Thomas Symons and his heirs all the said estates and premises, to the intent and purpose that Ann Constable should, subject to the mortgage, receive a rent-charge of 30*l.* per annum for her natural life out of the premises; and as to the fee and inheritance thereof, subject to the mortgage and annuity, to the use of William Watkins and Philadelphia his wife, for their natural lives and the life of the survivor, with remainder, to the use of the heirs of the body of Philadelphia by William Watkins, with remainder to the use of the right heirs of William Watkins for ever.

[Watkins *v.* Lewis.]

By indentures of the 23d and 24th June 1758, to which William Watkins and Philadelphia his wife were parties, after reciting that there was due for principal and interest upon the mortgage the sum of 1600*l.*, and that Ann Constable had paid the same to the persons entitled thereto, all the said mortgaged premises were by the mortgagees conveyed to Ann Constable and her heirs, subject to a proviso for the redemption thereof by the said William Watkins and Philadelphia his wife, or either of them, or by the heirs of either of them, upon payment of 1600*l.* and interest; and it was declared that upon payment thereof Ann Constable should reconvey to the uses of the indentures of the 24th and 25th days of April 1755. William Watkins and Philadelphia his wife thereby covenanted for the payment of the mortgage-money and interest.

By other indentures, dated respectively the 6th and 7th May 1760, William Watkins, in consideration of a release of the interest then due upon the said mortgage, and for other considerations therein mentioned, released and conveyed unto Ann Constable and her heirs all his estate and interest in the premises, but subject to the estate and interest therein of Philadelphia Watkins.

William Watkins, the husband of Philadelphia Watkins, died in her lifetime, and Edward Watkins, their eldest son, died in the year 1816, in the lifetime of Philadelphia Watkins, without issue, and John Watkins, the father of the plaintiffs, was the second son of Philadelphia Watkins by William Watkins, and he also died in the lifetime of Philadelphia Watkins, leaving the plaintiffs his only children and co-heiresses at law.

Philadelphia Watkins died on the 2d of February 1823, leaving the plaintiffs the heirs of her body by William Watkins.

Edward Watkins levied a fine of this property in Easter term, 18 G. 3., whilst his mother was yet living, and by indentures of lease and release of the 14th and 15th days of December 1780, Philadelphia Watkins and Edward Watkins, and the devisees and executors of Ann Constable, conveyed the *Gelly Vaur*, part of the property in the settlement, to James Jenkins and his heirs.

In Hilary term 1822, Philadelphia Watkins levied a fine of the Gelly Vaur, and the uses thereof were declared to Jenkins in fee.

By indentures of lease and release of the 22d and 23d days of June 1813, the same persons conveyed the *Pant*, other part of the property in the settlement, to John Price in fee. John Price by another deed demised the same to Edward Watkins for 500 years, to secure the payment of 2500*l.*, part of the purchase-money and interest.

By indenture dated the 20th of September 1822, between Philadelphia Watkins of the one part, and John Price of the other part, reciting, amongst other things, that it had been then lately ascertained, that at the time of the execution of the indentures of the 22d and 23d of June, 1813, Philadelphia Watkins was seised of or entitled to, amongst other hereditaments, the messuage or tenement and farm called the *Pant*, and the yearly sum of 4*l.* 5*s.* 2*d.* for an estate or interest in tail under or by virtue of the uses or limitations contained in the indenture of release of the 25th April 1755, and that inasmuch as the fine so levied in the 18 G. 3. was levied by Edward Watkins, in

[Watkins *v.* Lewis.]

whom *the remainder or reversion of such estate tail was vested,* and not by Philadelphia Watkins*, it had been deemed expedient, for the purpose of barring or extinguishing the estate or interest in tail of Philadelphia Watkins of and in the said hereditaments, and of establishing and confirming the title of John Price and his mortgagee thereunto, that a fine should be levied by Philadelphia Watkins, and she thereby covenanted to levy a fine *sur conusance de droit cum ceo*, &c., with proclamations, of the premises comprised in the indentures of the 22d and 23d June 1813. And it was declared that the same should enure to the use and intent, in the first place, to establish and confirm the term of 500 years granted or demised to Edward Watkins, his executors, administrators, and assigns; and subject thereto, to John Price in fee.

The last-mentioned fine was levied by Philadelphia Watkins in Trinity term, 3 G. 4.

Mr Bickersteth, Mr Preston, and Mr Jacob for the plaintiffs.

The first question is, Whether this was a provision made by William Watkins for his wife and family?

Secondly, Whether Philadelphia Watkins has properly alienated this property? And,

Thirdly, Whether the purchaser had notice?

As to the first question, Whether this was a purchase by the husband so as to make it an estate tail within the statute, or whether Ann Constable was the purchaser of the equity of redemption? It is clear that the property was contracted to be purchased by Watkins, and it is a purchase by the husband, so as to make it a provision moving from the husband. Watkins was bound to pay the purchase-money. Suppose the wife had died the day after the contract, must not Watkins have paid the purchase money? his personal representatives could not have refused to pay it. It is not sufficient to show that Mrs Constable paid the purchase-money in consideration of the settlement; but it must be shown that she purchased the equity of redemption in fee.

Now, suppose Mrs Constable had become bankrupt, could her creditors under the then bankrupt laws have recovered the estate, or the money which had been paid for it? they certainly could not.

This is not the purchase of an equity of redemption, but the purchase of the estate.

Most of the cases on this subject are collected in Viner's Abridgment, under the head *Jointure and Jointress*, vol. xiv. 549.; and the case of Simson *v.* Turner, 1 Eq. Ca. Ab. 220, decided by the Lord Keeper in Trinity term, 1700. (also in Viner, 555.) In Cruise on Common Recoveries they are collected, *Stockbridge's case*, Cro. Eliz. 24. If husband and wife are joint tenants, and settle—as to one moiety, it is the settlement of the wife, and as to the other moiety, of the husband.

* Philadelphia alone was seised in tail. During her lifetime the issue were not seised at all, and Edward having died in her lifetime, he never had any interest at law or in equity.

There is also a case in Dyer,* where the husband and wife were, under their marriage settlement, joint-tenants in tail; there the father of the wife covenanted in the settlement to pay 70*l.*, the wife survived and levied a fine which was adjudged to be against the statute; the report states, that the settlement was as well in consideration of the marriage as the money. Now this case shows, that although part of the money be paid by a friend of the wife, that payment does not take the case out of the statute.†

If an estate be purchased where the consideration moves partly from the husband or his family, and partly from the wife and her family, the whole is subject to this statute; otherwise a difficulty would arise in severing the parts to be within the statute, from those not within it, according to the consideration paid by the parties. In Stockbridge's case, *ante*, 477, the husband and wife were previously entitled to the copyhold; the husband purchased the freehold, yet the court considered it merged and bound by the statute, Symson *v.* Turner, 1 Eq. Ca. Ab. 220.

As to the second question, the conveyance to Jenkins contained a declaration that all fines, and particularly the fine of 18 G. 3., should ensure to the purchaser. It was founded on the fine of Edward Watkins alone, without the widow—the widow being then tenant in tail in possession. Edward died in 1816, and his death terminated his interest in the property, and of all persons who could claim under him. John had died before. Upon the death of Edward without issue, the plaintiffs were heirs in tail in remainder expectant on the death of Philadelphia the mother.

In 1822 Mrs Watkins levied a distinct fine of the Pant estate, and executed a deed to confirm the title to the premises formerly conveyed to Mr Price. Now, the fine levied by Edward alone, could not operate upon the estate of his mother; and if the mother had her estate tail *ex provisione viri*, she could not alien without the concurrence of the next heir of the inheritance.

By the act of the 11 H. 7. c. 20., the fine levied by the son must be part of the same transaction with the fine levied by the mother, and the two fines can not be combined. By this statute it is provided, that it shall not extend to a recovery where the heirs next inheritable to the woman, or he that after her death shall have the inheritance, be assenting or agreeable to the recoveries, where the same assent or agreement is of record or enrolled.

The party must join in the very fine, or the deed whereby the assent is given must have been enrolled as part of the same transaction.

The two fines together can not effect the object. In Seymour's case, 10 Co. Rep. 96, the tenant in tail made a bargain and sale, and afterwards levied a fine. This was held not to be a discontinuance, because the bargain and sale and fine were not parts of the same transaction. In Herring *v.* Brown, 1 Vent. 368—371, it was admitted, that if a man,

* Villiers *et* Beamonte, Lincoln Dyer, 146 *a.*, Easter term, 4 & 5 P. & M., and 14 Vin. 551. The grandfather and grandmother of the husband settled the lands in this case.

† Piggott *v.* Palmer, Moore, 250. But see the cases of Eyston *v.* Studd, Plowden's Commentaries, 463.; Copland *v.* Piatt, Sir William Jones's Rep. 254.; and Cro. Car. 244. 14 Vin. 551. pl. 6.

having a power, levy a fine, and afterwards by deed execute the power, the fine destroyed the power. The fine of the son can not after his death be used as a consent to the fine of the mother. She was for the purpose of her sole alienation, no more than a mere tenant for life.

Inasmuch as Edward was dead without issue when Philadelphia levied her fine, that fine is within the statute of Hen. 7.: and the fine of Edward, he having died in the life time of Philadelphia, was worth nothing; but had he survived, then, by force of the statute 11 Hen. 7., if proclamations were made, his fine would have been an effectual bar. When tenant in tail hath two sons, and the eldest son levies a fine with proclamations; and the father dies leaving that son or any descendant of that son inheritable to the tail, the fine will bar; but if the first son dies without issue in the lifetime of his father, the second son or his issue are not barred. Edward Watkins, when he levied the fine, had no interest in the property, but had he survived his mother, the fine would have bound him and his issue by estoppel.

As to the third question. The purchaser had notice of the settlement* through the deed of 1780, which set out that settlement. The legal estate is outstanding, therefore, the only remedy the plaintiffs have is in this court.

Mr Tinney and Mr Wrottesley for John Price. This is a bill filed for redemption of the mortgage; and we maintain that this was a settlement of the equity of redemption which was paid for, not by the husband, but by Ann Constable, the half sister of the wife, and not a settlement proceeding from the husband *ex provisione viri*. The whole purchase was a purchase of the equity of redemption for 980*l.* 10*s.* Then follows the settlement upon which all this question arises; and it is stated therein that she had advanced the whole consideration for the purchase thereof, upon condition that it should be settled as thereinafter mentioned.

Now the statute of 11 Hen. 7, only applies when the property moves from the husband. We admit it is not necessary that the whole should move from him, Ward *v.* Walthew, Cro. Jac. 173.; Copland *v.* Piatt, *ante*, 478.; Kynaston *v.* Lloyd, Cro. Jac. 624.; Eyston *v.* Studd, *ante*, 478. To bring the case within the statute, it must be shown that the estate moved from the husband. The value of the estate, it being an equity of redemption, was 980*l.* 10*s.*; that was the whole consideration, and that was paid by Mrs Constable. In the cited case of Simson *v.* Turner, *ante*, 478, the lands were given by the husband's ancestors.

It is said that part of the consideration came from Watkins, because he became liable for the mortgage-money; but if a tenant for life pays off a mortgage, he keeps it subsisting, and is entitled to it: the property is expressly conveyed subject to the mortgage for 1500*l.* In 1758 Mrs Constable paid off the mortgage-money. Watkins had not kept down the interest; and Mrs Constable paid off principal and interest, and took a covenant from Watkins, that he and Philadelphia his wife, or their heirs, would pay it off; but this can not affect the transaction of 1755. After this she took a conveyance of his life-interest, and released him from all responsibility in respect of the mortgage. All

* Mr Tinney admitted this.

these circumstances show what the transaction was. Now it is said that this statute would protect not only the issue, but the other persons taking under the settlement; but Mr Watkins has conveyed all his interest to Ann Constable; and her devisees, with Philadelphia and Edward, joined in the sale; and if this case be within the statute, has not the statute been satisfied? Edward at that moment was the person "next heritable to the said woman." In the conveyance Philadelphia Watkins entered into a covenant for further assurances. The next heir assented to a conveyance by her of those lands, and he was the person whom the statute meant to protect. The purchaser called upon Philadelphia Watkins, on her covenant for further assurances, to levy a fine, and she did so. It is not required that the next person entitled should join, but should assent. His assent is here of record; and that takes the case out of the statute. Where can be the difference whether Philadelphia Watkins levied the fine at the time of the assent or afterwards? Villiers *v.* Beaumont, *ante*, 478. But if Philadelphia be an ordinary tenant in tail, her fine is a sufficient title.

Mr Treslove and Mr Duckworth, for Lucas and wife and Oliphant, mortgagees of Price. What was the object of the party who made the settlement? The object of Ann Constable was to provide for the issue of her sister. Copland *v.* Piatt, *ante*, 478. The question is, whether the settlement comes from the husband: if it does, then it is within the statute.

Do the cases which have been cited compel the court to come to the conclusion which the plaintiffs seek to attain? Certainly not: all the cases cited are either of marriage alone, marriage with money, or the lands moved from the husband or his ancestors, Llinaston *v.* Lloyd, Palmer, 213.

In a case in which husband and wife were joint-tenants, and the wife levied a fine, his part was held to be within the statute, but the other was not so. In the case of Copland and Piatt the 140*l.* was a marriage portion. In the Bishop of Exeter's case, where the consideration was the property of the husband, and he conveyed to husband and wife in tail, yet that was held to be not within the statute. It is true, it there appeared that the wife was a cousin of the bishop. Now, although the conveyance was to Watkins, yet, if it appeared that the purchase was originally made for the wife's friends, that trust would have its effect. The settlement overrides the whole transaction from the very beginning.

Mr Pemberton and Mr Turner for a trustee.

Mr Bickersteth in reply.

If this case is not within the statute, I admit that the fine of Philadelphia Watkins in 1822, established the defendant's title. The fine levied by Edward ceased to have effect on his death. It is said, that the fine levied in 1778 by Edward can be connected with the fine of Philadelphia in 1822. I admit that if Edward, or any issue of his had been then living, it would have had effect, although no authority has been produced to show that it would. In Hawkins *v.* Kemp, 3 East, 410; a case as to powers, it was held, that the defect of one deed could not be supplied by another; and the principle of it applies to this case. The fine of Edward only operated by way of estoppel to himself and his

issue. There is nothing to show that the covenant in 1780 is connected with the fine of 1822.

The fine of Edward can not be considered that species of agreement or consent upon record which the statute requires. I contend that the case is within the statute. The conveyance is to Watkins and his heirs alone, and he was possessed of it as his own estate, subject to the mortgage then outstanding. If Mrs. Constable had been the purchaser, she would have had to pay the mortgage; but Watkins was the person who was to pay the mortgage-money, and he was to pay Mrs Constable an annuity for her life. Mrs Constable took an assignment of the mortgage, but took Watkins's covenant to pay it. The statute was framed for the purpose of preventing a wife, who had acquired an estate from the provision of the husband from disposing of it. That statute has been construed liberally in favour of the cases which come within the principle, although not within the letter. There is not, I admit, a case exactly similar to this, but there are cases involving the same principle. One of the considerations given to the husband was a sum of money. It is not the money consideration given by the friends of the wife that will take the case out of the statute.—*Cur. adv. vult.*

*March* 9. The Master of the Rolls. This is a settlement of the equity of redemption only. If William Watkins had paid off the 1500*l.*, he could have kept it on foot against the settlement. The whole consideration for the equity of redemption was paid by the sister of the wife.

This case is in words within the statute, as the estate was in words and in strictness of law a purchase by the husband. But it is equally clear, that it is not within the spirit or the equity of the statute. The statute was made to prevent a widow from parting with an estate tail actually coming from the husband or his ancestors to the disherison of his heirs; but this equity of redemption, the only property settled, never came from the husband or his ancestors, but was provided substantially and entirely by the wife's sister. Now it has been decided several times (if any thing could be wanted for such a point,) that a case, though within the words of the statute, may not be within the spirit; and this is one of the cases not within the spirit of the statute. And I am of opinion, therefore, without adverting to the other circumstances of the case, that this bill must be dismissed, and with costs.

Reg. Lib. 1830. B. p. 1196.

## Livesey *v.* Harding.
## Livesey *v.* Beckett.

1 *Tamlyn*, 460.

An heir at law in his answer to a bill to establish a will, admitted that the will was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will, and the sanity of the testator: Held, that the court would not allow him to do so.

[Livesey *v.* Harding.]

A gift to daughters, and the heirs of their bodies as tenants in common; and if only one, to such only daughter and the heirs of her body, with remainder to the testator's right heirs:

Held, that there were cross remainders between the daughters.

The testator having directed his two trustees to apply a moiety of rents or such part as they or he should in their or his discretion see fit in the maintenance and education or advancement in life of his younger children during the life of his wife; and one of the trustees having died, the court would not interfere with the discretion to be exercised by the surviving trustee.

*Rolls*, July 8, 1830.

THIS was a suit to establish the will of Edward Livesey, whereby he devised his real and personal estates unto the defendants, William Harding and John Harding, their heirs and assigns, upon trust, after certain payments, to pay and apply a moiety of the residue of the rents and profits, or such part of a moiety as they or he in their or his discretion should see fit in the maintenance, education, bringing up, or advancement in life of his younger children or child, and the issue of such of them as should die in the lifetime of his said wife, as to them or him should seem eligible during the natural life of his wife; and subject to that and some other payments, he gave and devised his estates unto his said trustees, their heirs and assigns, to the use of his eldest or only son for and during the term of his natural life; remainder to the said trustees to preserve contingent remainders; and from and after the decease of his said son, to the use of such child or children, or remoter issue of his said son, as he should appoint in the manner in the said will mentioned, and subject thereto, to the use of the first and all and every other son and sons of his said son in tail in succession; remainder to the daughter and daughters of his said son in tail; and in default of such issue of his said son, to the use of all and every the daughter and daughters of him the said testator, and the heirs of their bodies, to take as tenants in common, if more than one, equally, and if but one, to the use of such only daughter of him the said testator, and the heirs of her body for ever; and for default of such issue, to the use of his heirs for ever.

The testator appointed his trustees guardians of his children and executors of his will.

He left Edmund Worthington Livesey, his eldest son and heir-at-law, and Mary Carter Livesey, James Worthington Livesey, Harding Livesey, and Eliza Armstrong Livesey, his only younger children.

The bill prayed that the will might be established.

Edmund Worthington Livesey, the heir-at-law, by his answer, said, that the will was not made according to the instructions and intentions of the testator, it being his intention, that on failure of issue of the eldest son, the property should go to his younger sons and their issue successively before the daughters; but this defendant admitted that the testator was in a sound state of mind when he executed his will, and that the same was duly executed as by law is required for passing freehold estates.

James Worthington Livesey, by his answer, disputed the will, alleging that the same was not made agreeably to the instructions given by the testator, and said that the testator was addicted to excessive in-

temperance, and was in a state of derangement and utter incapacity to manage his own affairs, except at times.

The bill was replied to, and further proceedings had therein.

Edmund Worthington Livesey died unmarried, leaving the plaintiff Mary Carter Livesey, the only surviving daughter of the testator, Eliza Armstrong Livesey, the other daughter, having died before E. W. Livesey, without issue.

The suit was revived, and James Worthington Livesey, the eldest brother and heir-at-law of E. W. Livesey, and also heir-at-law to the testator, in his answer to this bill of revivor, said, that since the filing of the original bill he had discovered, and verily believed the truth to be, that Edward Livesey, at the time of making his will, was not of sound mind, memory, and understanding, or, at any rate, that he was acting under an undue influence exerted over him by the defendants William Harding and John Harding, and by Archibald Keightley the elder, the solicitor and brother-in-law of the defendant John Harding.

Mr Agar, Mr Preston, and Mr Duckworth, for the plaintiff, cited Tucker *v.* Phipps, 3 Atkins, 359.

Mr Treslove and Mr Ward, for Mr Livesey, cited Sleeman *v.* Sleeman, 2 Dickens, 787, and Cartwright *v.* Cartwright, 2 Dickens, 545.

The Master of the Rolls. The heir-at-law has admitted the will to have been well executed, and the sanity of the testator at the time of making the will. Has any thing occurred to authorize the court to relieve him from the admission? Must not the court infer that the heir-at-law had made every necessary inquiry in order to obtain information before he made the admission? Is it possible then to allow a succeeding heir to dispute the will? I can not follow the cases that have been cited. Mr Dickens was not a very accurate reporter. The brother is bound by the admission made by the heir-at-law. I can not direct an issue *devisavit vel non*, but Mr Livesey is entitled to make what use h can of the question of construction.

Declare one moiety of the rents and profits to be applied to the maintenance of the younger children during the life of the wife.

The application of it is left to the discretion of the trustees, as they or he shall think fit. I could only make a declaration in the words of the will. One of the trustees is living. The discretion is vested in the surviving trustee.

Mr Agar then, on the question of cross remainders, cited Watson *v.* Foxon, 2 East, 36; Green *v.* Stevens, 17 Ves. 64. One of the daughters, who survived the testator, is dead, and, according to the doctrine of cross remainders, the whole is now in the surviving daughter.

Mr Preston. There is sufficient in the will for cross remainders. Cross remainders are, from the words in default of such issue, or any like expression, to be implied between two, but not where there are more than two; but if there be a gift to a class of persons, the rule of cross remainders applies. This is a gift to a class of persons who may be more or less than two.

[Livesey *v.* Harding.]

Mr Treslove contended, that there was no ground for inferring cross remainders.

The MASTER OF THE ROLLS. The gift over here is in default of issue; that is what I most rely upon.

*July* 16.—The MASTER OF THE ROLLS. The question is, whether any part of the estate should go over so long as there is issue of any of the daughters? I think the cases upon this subject have been very absurd in drawing the distinction that cross remainders should be implied when there are only two, but not where there are more than two. I own I am of opinion that no part of this estate is to go over as long as there are issue of any one of the daughters.

The cause then stood over for judgment to the following Monday.

*July* 19.—The MASTER OF THE ROLLS. In this case the testator had limited his estate in remainder to his daughters in tail, and if but one, then to her in tail; and in default of such issue, then to his own right heirs. I am of opinion that no part of the estate goes over until there be a general failure of issue of all the daughters; and, consequently, I hold there are cross remainders between them.

Decree, that according to the true construction of the will, there were cross remainders between the two daughters of the testator, and that Mary Carter Livesey, the surviving daughter, is entitled to the whole estate of the testator as tenant in tail thereof.

Reg. Lib. 1830. B. 2497.

## Dawson and others *v.* Hearn and another.

1 *Tamlyn*, 465.

A testator directed that an annuity of 250*l.* should be purchased for his wife within three months after his decease. She survived him seven months, but the annuity had not been purchased at the time of her death. Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the court decreed accordingly.

But if an annuitant has received the annual sum, the court will direct an inquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum.

*Westminster Hall*, June 14, 1830.

WILLIAM HEARN, by his will, bearing date the 7th day of September 1823, *inter alia* gave and bequeathed as follows:—"I also direct, that from and out of my moneys and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a government annuity of 250*l.* per annum, in the name and for the use of my said wife during her life; and I further will and direct, that in case my personal estate shall prove

insufficient to purchase, and pay and satisfy the annuities and several pecuniary legacies hereinbefore by me directed and given, I charge and make subject my said estate at Singleborough with and to the deficiency therein. All the rest and residue of my personal estate I give to my brother William Hearn, to be disposed of amongst his children and grandchildren, as he may think fit; and I nominate and appoint my said brother William Hearn, and nephew Thomas Hearn, executors of this my will."

The testator died on the 28th day of April 1827, and his wife died in November following, having previously bequeathed her personal estate to her two sisters, one of whom is plaintiff to this suit, and the other sister has since died, leaving the other plaintiff her executor.

The annuity was not purchased. The bill stated the preceding facts, and prayed that it might be declared that the plaintiffs were entitled to be paid from the assets of the testator, such sum of money as would have been required at the expiration of three months after his decease to purchase a government annuity of 250*l.* during the life of Susannah Hearn, the widow of the testator, with interest thereon from that time. The defendants by their answer said, that no sum of money was ever invested in the purchase of an annuity for the said Susannah Hearn, deceased, or paid to her in respect of the sum required for the purchase of the annuity of 250*l.* in the said bill mentioned; for that at the death of the said testator, his assets consisted principally of money out on securities, which could not be immediately got in, and that at the end of three months after the death of the said testator, they had not possessed assets sufficient to purchase the said annuity, and that the funds were then very high, and that the health of the said Susannah Hearn was then very precarious, and the defendant Thomas Hearn, who principally acted in the executorship, therefore informed the said Susannah Hearn of his intention to postpone the purchase of the said annuity, and told her, he doubted not that she would feel satisfied with the security of the said William Hearn (his father) and himself, as executors of the testator, for payment of the said annuity in the mean time, or to that effect; to which she made no objection; and the defendants admitted sufficient assets to purchase the annuity.

Mr Bickersteth and Mr Swanston for the plaintiffs.

Had a sum of money, equal in value to the annuity, been given to Mrs Hearn, it would have vested in her; and the ground on which the court gives the representatives of an annuitant what the purchase would have cost is, that the annuitant might, when the annuity is purchased, sell it if she pleases. The reasoning of the answer, that the stocks were high, could not deprive her of her rights. Palmer *v.* Crawfurd, 3 Swanst. 482, Bayley *v.* Bishop, 9 Ves. 6, Yates *v.* Compton, 2 P. W. 309, Barnes *v.* Rowley, 3 Ves. 305.

The bequest of a sum for the purchase of an annuity entitles the legatee to the specific sum. When the time arrived (three months,) it was clearly ascertained what sum was requisite, and by the bequest of Mrs Hearn became entitled to a legacy equal to the sum which would have been requisite to purchase the annuity at the end of three months from the death of the testator.

[Dawson *v.* Hearn.]

Mr Pemberton and Mr Turner for the defendants.

Where there is no bequest of a principal sum, but only of an annuity, the principle contended for can not apply. The purchase of an annuity depends upon the health of the annuitant, and other circumstances may influence the value.

Suppose the executors had purchased the annuity some months after the expiration of the three months, and stocks in the mean time had fallen, would the executors have been liable for the difference? A passage has been read from the answer explaining what the circumstances were which prevented the purchase of the annuity, and that the annuitant did not object to the security of the testator's estate, and to receive the annuity from it. It is plain from this will, that the testator meant that this should be an annual provision for the wife. He gave her other legacies. Can it be said, that as she did not choose to make her election to have the annuity purchased, her representatives can elect now?

All the cases, except that of Sales *v.* Compton, are bequests of principal sums. In that case, Jane Stiles, the annuitant, was entitled to the whole produce of the real and personal estate; and the question was, whether the estate did not remain unconverted? The decision was, that the realty was converted. The cases cited do not apply.

The testator meant to make a provision for his wife for her life. Now what is the practice of the court? It sets aside a sum to answer the annuity. The only exception is an insolvent estate, in which the court has directed an annuity to be purchased in the government securities. Now, if a party makes a claim, but submits to receive the annuity, the representatives of that party can not quarrel with the acts of the person whom they represent. The party who had the power has entered into the arrangement, and her representative can not quarrel with it.

The Master of the Rolls. It can make no difference whether a certain sum is given to purchase an annuity, or a certain annuity is directed to be purchased; and the court considers it a legacy to the amount of its value: but the annuitant may waive it, and receive the annual sum from the executors.

In a case which occurred last term,* the annuitant had received the annuity for some time, and I directed an inquiry, whether she had elected to take the annuity, but here, it is not contended by the answer of the executors that the annuitant waived the right of having the annuity purchased; the answer states that they proposed to postpone the purchase. On the part of the annuitant, it was at most but a mere assent to a proposal to receive the annuity until the purchase was made, and consequently she still continued entitled to the sum which would have been requisite for the purchase of the annuity, and her representatives are now entitled to that sum.

*BROWN *v.* ROSS.

*May* 6.—This suit was on a direction in a will, that a sufficient sum should be set apart for the purchase of an annuity of 750*l.* The defendant by his answer stated that he had from time to time paid the annuitant the growing payments of the annuity during her life, and that such payments were received by the annuitant in full satisfaction of the annuity.

It does not appear that the executors communicated their reasons to the annuitant.

Let the Master inquire what sum would have been required at the expiration of three months from the death of the testator to purchase a government annuity of 250*l.* during the life of Susannah Hearn; and declare that the plaintiffs are entitled to the sum that would have been so required, with interest at 4*l.* per cent., and that the defendants pay unto the plaintiffs the said sum and interest, with their costs.

Reg. Lib. 1830. A. p. 1902.

## Charles Marriott, plaintiff; and Thomas Sneyd Kinnersley, Thomas Meggison, Charles Kaye, and John Westcote Bampfield, and Elizabeth, his wife, Mary Meggison, widow, John Middleton Meggison, and Henry Cubitt, defendants.

1 *Tamlyn*, 470.

Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent: Decree, that the other trustees account for and pay the amount.

*Rolls*, July 7, 1830.

ELIZABETH MARRIOTT, the mother of the plaintiff, sold out some East India bonds which had been given to her by the defendant Kinnersley, and invested the produce in the purchase of 3620*l.* 3*s.* 4*d.* three per cent. consols, in the names of defendant Kinnersley, defendant Charles Kaye, and defendant Thomas Meggison, and caused to be effected on the 24th of February 1814, with the Equitable Insurance Company, a policy of insurance for 2000*l.* on her life. By indenture bearing date 7th of May 1815, made between Elizabeth Marriott of the one part, and those three defendants of the other part, Mrs Marriott assigned the policy to the three defendants, and it was thereby declared that they should stand possessed of the three per cent. consols, and the dividends thereof, and the policy of insurance, upon trust to vary the stocks, and out of the dividends from time to time to pay the premium of insurance, and to apply the whole or such part as they should think fit of the residue in the maintenance and education of the plaintiff until he should attain twenty-one, and to invest the surplus; and on the plaintiff coming of age to transfer the whole to him. In this deed there was a proviso that the trustees should not be answerable for any misfortune, loss, or damage in the execution of the trusts, except the same should happen by or through their own wilful default respectively. The payment of the premium on the policy was discontinued in 1819.

The trustees executed a power of attorney on the 9th of May 1819,

The court directed an inquiry, how it happened that the annuity was not purchased, and whether the widow assented; with liberty to state special circumstances.

The report is nearly ready, and this case will shortly be heard on further directions.

[Marriott *v.* Kinnersley.]

enabling Henry Vigne and Frederick Vigne to sell out the stock. The produce was received by the defendant Charles Kaye, who afterwards became insolvent.

The defendant Kinnersley did not execute the trust-deed.

The bill prayed that it might be declared that the defendants Kinnersley, Meggison, and Kaye, had committed a breach of trust, and that they should replace the stock and dividends, and the policy of insurance.

The defendants Kinnersley and Meggison never received the dividends, nor interfered in the trusts, further than that Meggison executed the deed and power of attorney, and Kinnersley the power of attorney only.

Defendant Kinnersley stated in his answer, that he had no knowledge of the deed, to which he never assented that he should be made a party, and that he had not in any manner authorized any person to name him a trustee therein; that he never executed or saw the deed, or any draught or copy thereof, or consented to become a trustee thereunder; nor did this defendant know, nor had he reason to believe, that any trusts had been declared in favour of the plaintiffs; this defendant also said, that he refused to allow the stock to be purchased in his name, and that not knowing that the stock was invested upon any other trust than for Mrs Marriott, and believing she had the entire control of it, he did, at the request of the defendant Kaye, who was her solicitor and agent, execute the power of attorney, which he delivered to the defendant Kaye.

The defendant Meggison died, and the bill was revived against his representatives.

It appeared that the application of the defendant Kaye, to the defendant Kinnersley, to execute the power of attorney, was by letter, wherein occurs this passage: "It becomes necessary for the advancement of Charles Marriott the plaintiff, that the stock should be sold out."

Mr Pemberton and Mr Beames for the plaintiff.

Mr Kaye having determined to appropriate the stock to himself, wrote a letter to Mr Kinnersley, desiring him to execute a power of attorney. Mr Kinnersley incautiously executed the power of attorney. A person who is appointed trustee with his consent can only discharge himself by applying the fund as *cestuique trust* may direct, or by transferring it to other persons by the direction of the *cestuique trust*. He has acted, and is therefore liable.

Mr Meggison signed the deed, and he was bound to see to the proper application of the funds. He chose to trust to Mr. Kaye, and his estate must answer for the loss sustained. Mr Kinnersley says in his answer, that he had no distinct notice of the trust reposed in him; but the letter of Mr Kaye is evidence that he had notice, for there he calls upon him to join in an act for the purpose of raising money, which was represented to him to be in conformity to the trusts. The very act of transferring was such an act as amounted to an acceptance of the trusts.

Mr Barber for a defendant in the same interest.

Mr Tinney for Mr Kinnersley.

Mr Charles Kaye was the confidential solicitor of Mrs Marriott, now

Mrs Bampfylde, and he informed Mr Kinnersley that the funds were transferred into his name. Now Mr Kinnersley knew of no trust deed, nor of any trust, but for Mrs Marriott. Charles Marriott was only a natural son of Mrs Marriott; and a person who creates a voluntary trust may discharge it, this was decided by Lord Eldon in the case of Walwyn *v.* Cooke, 3 Mer. 707., and therefore I ask your honour to direct an inquiry whether Mrs. Marriott did any act by which the trusts might be discharged, by which Mr Kinnersley might be discharged from these trusts.

Mr Wright (with Mr Tinney.) This trustee was not liable to the acts of the other trustees. Bacon *v.* Bacon, 5 Ves. 331. Trustees are not liable to the consequences of any thing they do for the sake of conformity. Hovey and Blakeman, 4 Ves. 595; Chambers and Minchin, 4 Ves. 185.

Mr Bickersteth and Mr Swanston for the representatives of Mrs Meggison.

Unfortunately the question is too clear; and the only question is as to the consequences: the money is gone by the fraud committed by Mr Kaye, but Mr Kinnersley's liability is as great as Mr. Meggison's.

The Master of the Rolls. Mr Meggison chose to confide in Mr. Kaye contrary to his duty, and he must suffer for Mr Kaye's neglect or default. Mr Kinnersley's case is very hard, but the question is, whether Mr Kinnersley has not incautiously done an act which has placed this property in the hands of individuals who have abused it. Mr Kinnersley will be charged with no dividends prior to his *acting*, nor will he be charged with the loss sustained by the neglect about the policy; he is only liable to the fund transferred, but Mr Meggison's representatives must be charged with a general breach of trust, with the loss sustained by the discontinuance of the policy, and must pay costs. But I will not charge Mr Kinnersley with costs, I give the costs against the executors of Mr Meggison and against Mr Kaye.

With respect to what the counsel for Mr Kinnersley has said about Lord Eldon's doctrine, he has mistaken it. If there be communication between a trustee and a person for whose benefit a trust is created, then the trustee is liable to him; but he is only not so when there is not that communication; this applies to conveyances upon trust for creditors.

The stock itself must be replaced.

Reg. Lib. 1829. B. p. 2712.

## Winter *v.* Hicks.

1 *Tamlyn*, 475.

An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it.

The administrator entitled to his costs out of the produce of the sale of a real estate, his intestate having been a trader.

The heir-at-law entitled to his costs from the plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator.

February 15, 1830.

THIS was a suit instituted by a creditor against the administrator and heir-at-law of Mark Hicks the intestate; and it was charged in the bill, that the intestate at the time of his death was a trader within the true intent and meaning of the bankrupt laws. It appeared by the Master's report, that the personal estate possessed by the administrator amounted to 170*l.* 11*s.* 10*d.*, and that the administrator had paid several sums of money in respect thereof to the amount of 64*l.* 3*s.* 11*d.*, leaving a clear balance of 106*l.* 7*s.* 11*d.*, which, being insufficient for the payment of 232*l.* 8*s.*, the amount of the intestate's debts, the Master had ordered the real estate to be sold, and the produce of such sale, with the rents and profits, amounted to 332*l.* 6*s.* 9*d.*, which had been first applied in the payment of 310*l.* 4*s.* 1*d.*, the principal and interest due on a mortgage thereof, leaving a balance of the real estate to the amount of 31*l.* 2*s.* 7½*d.* The administrator being himself a creditor, had, in the accounts which he had carried in before the Master, claimed to retain the amount of his own debt.

Mr Milford, for the plaintiff, contended, that as the estate of the intestate was insolvent, the administrator was not entitled to have his costs out of the fund; and in support of that doctrine, cited Wilkins *v.* Hunt, 2 Atkyns, 151. He further contended, that the administrator not having distinctly retained his debt, before the suit was instituted, he was not now entitled to do so.

The Master of the Rolls decided, that the administrator was entitled to his costs, and that the administrator having claimed his debt before the Master, that was sufficient to entitle him to retain it.

Mr K. Parker, for the heir at law, applied for his costs.

It was ordered, that the plaintiff should pay his costs, and receive it over out of the fund without prejudice to the costs of the administrator.

## Mills *v.* Robarts.

1 *Tamlyn*, 476.

Bequest of 10,000*l.* provided the legatee attain twenty-one.

In a subsequent part of the will the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated:

Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent.

The legatee being a natural child, the testator had no power to appoint guardians for her, but the persons named in the will being well known to the court as proper persons, they were appointed guardians without a reference to the Master.

*Rolls*, May 26, 1830.

GEORGE JAMES ROBARTS, by will bearing date the 24th of November 1823, after giving to plaintiff and Abraham Wildey Robarts a sum of 8000*l.* in trust to pay the interest to Mary Anne Harben during her life; and after mentioning that he had by a certain deed placed in the names of trustees the sum of 10,000*l.* 3 per cents. for the use of said M. A. Harben during her life, gave and bequeathed the said sum of 10,000*l.* after the decease of M. A. Harben, to be equally divided between her two children, Georgiana Charlotte Harben Robarts and her infant brother James George Harben Robarts, for their joint use and benefit for ever. In the event of their both dying before they attained twenty-one, then over. He also bequeathed to the same two children, after the decease of their mother, in equal proportions, the sum of 8000*l.* before mentioned, subject to the same bequest over in the event of their dying under twenty-one years. After another bequest, the testator proceeded as follows:—

"I will and bequeath to my daughter Georgiana Charlotte Harben Robarts, daughter also of the above-named M. A. Harben, the sum of 10,000*l.* sterling for her own absolute use and benefit, *provided* she attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* sterling to her brother James George Harben Robarts, provided also he attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* to my nephew Henry Robarts and his heirs for ever." This was followed by a bequest of another sum of 10,000*l.* in similar terms to James George Harben Robarts, remainder over to his sister in the event of his dying under twenty-one, remainder to Henry Robarts in the event of both dying under that age.

In a subsequent part of his will the testator proceeded thus:—

"I constitute and appoint my brother Abram Wildey Robarts, and my much esteemed friend Charles Mills, jun. of Birchin Lane, trustees and guardians to the several persons before named in this my last will and testament; and I earnestly request and implore, that they would have the goodness to act, and to attend particularly to the education and well-being of Georgiana Charlotte Harben Robarts, and see that she is properly and virtuously brought up and educated. And I further will

and direct, that the said Georgiana Charlotte Harben Robarts is on no account to dispose of herself in marriage without the consent of her guardians either before or after she attains twenty-one, on pain of forfeiting two thirds of the value of the legacies bequeathed to her."

The testator appointed his brothers and sisters residuary legatees; and Mills and Abram W. Robarts executors.

The bill was filed by one of the executors to ascertain the interest of the parties in the two legacies of 10,000*l.*, and praying also that guardians might be appointed for the infants, and the funds secured; and the principal question was, whether the children were to be allowed maintenance out of the interest of these legacies, no other provision being made for their maintenance? The children were illegitimate.

Mr Pemberton and Mr Roots, for the infants, insisted that the clause directing the trustees to attend to the education and well-being of the daughter, and appointing them guardians, clearly showed that that legacy must be considered as vested, subject to be divested in a certain event; and cited Branstrom *v.* Wilkinson, 7 Ves. 421, Acherley *v.* Wheeler and Vernon, 1 P. Wms. 783.

Mr Tinney and Mr Rolfe for the residuary legatees, argued, that the testator having bequeathed the first two legacies of 10,000*l.* and 8000*l.* in such manner as to make them vest (subject to the mother's life-interest,) and by making the two latter legacies of 10,000*l.* contingent, had drawn a distinction which sufficiently indicated his intention not to give the children the interest of those two legacies in the mean time. And they concluded that the appointment of guardians might have reference to the event of the mother's dying during the minority of the children, in which case they would be provided for out of the interest of the two first legacies of 10,000*l.* and 8000*l.* which were vested.

Mr Heathfield for Henry Robarts.

The Master of the Rolls. Upon this will, it is perfectly plain these children were not intended to take the two sums of 10,000*l.* unless they attained the age of twenty-one; but the question is, whether, in other parts of the will, the testator has not used expressions which manifest that he intended they should take the interest of those sums in the mean time?

Now he appoints trustees and guardians, and they are to have the charge of the education of these three children. Could the testator intend that these trustees should educate the children from their own property? and must it not be intended that he meant they should be trustees of the infants' property, to hold it for their benefit, provided they should attain twenty-one, and to apply the produce of it in the mean time to their education? The case of Branstrom and Wilkinson is an express authority to this effect, and the words "when they shall attain the age of twenty-one years," provide for the same contingency as the words here used.

Declare that they are entitled to the interest from the testator's death. The fund to be secured.

Mr Pemberton. There must be a reference to the Master to appoint

guardians, because the testator was not by law empowered to appoint guardians for the infants.

The MASTER OF THE ROLLS said he should appoint these gentlemen at once to be guardians of the children, knowing them to be proper persons for such a trust.

His honour added, that he did not declare the legacies to be vested, for they were contingent on the event mentioned in the will, but that the interest should be applied to the maintenance and education of the infants.

Decreed that the infants were entitled to interest on the legacies from the death of the testator, and in case either of them should die under twenty-one, any of the parties were to be at liberty to apply. That the plaintiff and A. W. Robarts, on entering into a recognizance to account, be appointed guardians of the infants during their minorities, and until the further order of the court; and that the Master inquire what will be fit to be allowed for the maintenance and education of the infants for the time passed since the death of the testator, and the time to come.

Reg. Lib. 1829. B. p. 1958.

## Maria Meller and Ellen Richardson, executrixes of John Samuel Meller, deceased, plaintiffs; and John Lewis Minet, Isaac Minet, John Stride, Henry Cooper, Margaret Meller, William Beckett, and Henry Cipriani, defendants.

1 *Tamlyn*, 481.

J. S. M. being entitled to the dividends for 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment, to his next of kin, and being in prison for debt and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1000*l.*, and other sums therein stated to have been previously lent and advanced to him by H. C.

By a subsequent deed, in consideration of 1854*l.* therein stated to be due from J. S. M. to H. C.; and of 1000*l.* paid by J. L. M. and others, J. S. M. by the direction of H. C., appointed that the principal should on his death be transferred to J. L. M. and others, with a proviso that they should assign the same to H. C. on payment of 1000*l.* and interest, and all further advances.

The 1854*l.* or any part of it had not in fact been advanced by H. C.:

Held, that this was a clear fraud:

Held, that the appointment was well executed.

That the next of kin of J. S. M. had no claim.

That H. C. was a trustee for the personal representatives of J. S. M. for the excess beyond the money received by J. S. M.

That H. C. should pay costs.

May 7, 1830.

JAMES MELLER, by his will, bearing date the 3d December 1816, gave his residuary estate unto his executors, the defendants

[Meller *v.* Minet.]

Beckett and Cipriani, upon trust to pay the dividends to his wife for life, and after her death, to pay the dividends to the testator's son J. S. Meller during his natural life; and after the decease of testator's wife and son, upon trust to pay, assign, transfer, and make over the testator's residuary estate unto such person or persons, and to and for such use and uses as the said J. S. Meller, at any time or times, and from time to time during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his will as therein mentioned should direct or appoint the same, and in default of appointment, to the testator's next of kin.

The residue consisted, amongst other property, of the sum of 4300*l.* navy 5 per cent. annuities, since converted into 4515*l.* new 4 per cent. annuities. In March 1822, J. S. Meller was in great distress, and confined for debt in the Fleet prison.

The following agreement was there executed between J. S. Meller and the defendant Henry Cooper:—

"An agreement made on the 16th day of February 1822, between John Samuel Meller, of Welbeck street in the county of Middlesex, Esq., of the one part, and Henry Cooper, of Copthall court in the city of London, merchant, of the other part, as follows:—Whereas the said John Samuel Meller, under the last will and testament of his father James Meller, late of Howland street, Fitzroy square, in the county of Middlesex, Esq., deceased, is entitled to the right of disposing either by will or deed, amongst other sums, the sum of 4300*l.* navy 5 per cent. annuities, now standing in the names of William Beckett, Henry Cipriani, and Mary Meller, in the books of the governor and company of the Bank of England, as trustees under the said will; and the same annuities will be transferable on the decease of the said John Samuel Meller, but not sooner, being a part of the residue of the personal estate of the said James Meller, deceased. And whereas the said John Samuel Meller now stands indebted to the said Henry Cooper in several sums of money, by the said Henry Cooper lent and advanced to him from time to time, and having occasion for a further sum of money, hath contracted and agreed to sell and convey the said 4300*l.* navy 5 per cent. annuities to the said Henry Cooper for the further sum of 1000*l.* It is therefore witnessed, that in consideration of the several sums of money already lent and advanced to the said John Samuel Meller by the said Henry Cooper as aforesaid; and also, in consideration of the further sum of 1000*l.*, to be paid by the said Henry Cooper, his executors or administrators, to the said John Samuel Meller at the time or times, and in manner hereafter mentioned, he the said John Samuel Meller doth hereby promise and agree to and with the said Henry Cooper, his executors, administrators, and assigns, that he the said John Samuel Meller shall and will, at any time or times hereafter, at the request, costs, and charges of the said Henry Cooper, his executors, administrators, or assigns, convey, transfer, or assign, or direct to be conveyed, transferred, or assigned, the said sum of 4300*l.* navy annuities, transferable on his decease as aforesaid to any person or persons, and by any deed or deeds, and in such parts or portions thereof as the said Henry Cooper, his executors, administrators, or assigns shall by deed name, appoint, or direct. And the said Henry Cooper for himself,

his executors and administrators, doth hereby promise and agree to and with the said John Samuel Meller, that in consideration of conveyance or assignment, conveyances or assignments, direction or directions to be made by the said John Samuel Meller as aforesaid, that he the said Henry Cooper shall and will pay, or cause to be paid unto the said John Samuel Meller the further sum of 1000*l.* at the time of his executing the said conveyance or assignment, which is to be completed on or before the 15th day of March next; and also executing at any time after such other conveyances or assignment, direction or directions, wholly or in part, and in proportion, and as the 4300*l.* navy annuities shall be thereby respectively conveyed, assigned, or directed to be conveyed or assigned."

By indenture bearing date the 20th day of September 1822, made between John Samuel Meller of the first part, Henry Cooper of the second part, and the defendants John Lewis Minet, Isaac Minet, and John Stride, bankers, of the third part, reciting the will and agreement, and that upon the settlement of accounts between Cooper and J. S. Meller, the latter was, on the 16th of February 1822, indebted to H. Cooper in the sum of 1854*l.* 10*s.*, making, with the sum of 1000*l.*, the sum of 2854*l.* 10*s.* It is witnessed, that in consideration of the said sum of 1854*l.* 10*s.*, and of 1000*l.* paid to J. S. Meller at the request of H. Cooper by J. L. Minet, I. Minet, and J. Stride, he the said J. S. Meller, by the direction of Cooper, and by deed, sealed and delivered in the presence of two witnesses, directed and appointed that the sum of 4515*l.* new 4 per cent. annuities should, after the decease of him and Mary Meller, be transferred to J. L. Minet, I. Minet, and J. Stride, as their property; and he thereby directed and required the trustees to assign the same to them accordingly, with a proviso, that they should re-assign the same to Cooper on payment of 1000*l.* and interest, and all further advances to him by them.

J. S. Meller died on the 22d December 1822, having previously made his will, and thereby appointed the plaintiffs executors thereof.

Mary Meller died on the 27th October 1823. The bill stated the preceding facts, and that J. S. Meller continued in the Fleet prison until the 13th of June 1822, and that up to that time Cooper had advanced to him 40*l.* only. The bill also stated, that the admission in the indenture, that J. S. Meller was indebted to H. Cooper in the sum of 1854*l.* 10*s.* was contrary to the fact; and the bill prayed that the agreement of the 16th February 1822, and indenture of 20th September 1822, might be delivered up to plaintiffs to be cancelled, the plaintiffs thereby offering to pay to the defendants J. L. Minet, I. Minet, and J. Stride, and H. Cooper the principal and interest which should be found *bonâ fide* due to them for moneys advanced to J. S. Meller in his lifetime, on an account to be taken for such purpose; or that the indenture of the 20th September 1822, might stand as a security for the sum of 1000*l.* only and interest; and in that case, that defendants J. L. Minet, I. Minet, and J. Stride might be ordered to re-assign the residue of the said sum of 4515*l.* new 4 per cent. bank annuities, as the court might direct, and that in the mean time the defendants W. Beckett and H. Cipriani might be restrained by the order and injunction of the court from transferring or parting with the said stocks, or any of them, and that the same might be secured by the order of the court.

[Meller *v.* Minet.]

When this cause came on first to be heard on the 28th January 1828, the bill was dismissed as against the mortgagees, whose demands on Cooper exceeded the amount of the security, and a reference was made to the Master, to inquire what sums were due from J. S. Meller to the defendant Cooper on the 16th February 1822, the date of the agreement; also, what sums, if any, were paid by Cooper to J. S. Meller between the 16th day of February 1822 and the execution of the indenture of the 20th day of September 1822.

The Master reported, that he did not find that any sum of money was actually due from J. S. Meller to the defendant H. Cooper on the 16th February 1822. And he did not find that any subsequent advances were by the defendant H. Cooper to J. S. Meller between the 16th February 1822 and the 20th September 1822, the date of the indenture in the pleadings mentioned inclusive.

Depositions were read in evidence, showing the great distress of J. S. Meller, and that no such sum as 1854*l.* 10*s.* could have been due to Cooper at the time of executing the agreement.

Mr Bickersteth and Mr Skirrow for the the plaintiffs.
Mr Agar and Mr Hayter for the defendant Henry Cooper.

The Master of the Rolls. J. S. Meller was entitled to the residue of his father's estate, consisting of the sum of 4300*l.* navy 5 per cent. annuities.

At the time of the transaction in question he was a prisoner in the Fleet. The defendant Cooper there treats with him for the purchase of this stock, and the transfer of it at the time of his death. An agreement is executed, stating that Meller was indebted to Cooper, and in consideration thereof, and of the further sum of 1000*l.* to be paid by Cooper, Meller covenanted that he would assign the 4300*l.* annuities to Cooper.

I referred it to the Master to inquire whether there was any thing due in respect of the debts so stated in the agreement to be due to Cooper. The Master has reported that there was not any sum due.

A clear fraud has been established against Cooper: he persuaded Meller to sell the reversion for 1000*l.*, and Cooper, in order that he might be enabled to procure money upon it, and represent that he had given a fair value for it, persuaded Meller to allow it to be stated in the agreement, that he Meller, was indebted to Cooper, and that the purchase was as well in consideration of the sum which he was so indebted as of the further sum of 1000*l.* Cooper took advantage of this poor man's distress.

With respect to the plaintiffs, the appointment by which they claim, was made under a general power, which was clearly well executed. The next of kin can have no claim. The mortgagees being no party to the fraud, the appointment to them can not be impugned.

But is Cooper to escape? I am of opinion that the executors have duly filed their bill, and although they have not properly stated their prayer, yet under their prayer for general relief, they are entitled to such relief as the case made by the bill requires. I am of opinion that Cooper must be considered a trustee for Meller for the excess beyond

the money received by Meller from Cooper; and there is so much fraud in this case, that Cooper shall pay the costs.

An account to be taken of the stock which has been possessed by Cooper or Minet and Co.

Decree that (after deducting what shall be found due to Cooper on account of the 1000*l.* and interest) the value of the stock and dividends be paid by Cooper to the plaintiffs. Costs of suit and inquiries to be paid by defendant H. Cooper to plaintiffs.

Reg. Lib. 1829. B. 1502.

## Palmer *v.* Scott and others.

1 *Tamlyn*, 488.

An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook when thereunto required, to execute a transfer of the same:

Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein.

*Rolls*, March 1, 1830.

THE plaintiff having sold an estate, employed Mr Hampson, a banker and solicitor in Bedfordshire; and a letter from the plaintiff to him in December 1821, contained these words: "You will recollect that I propose to lay all the money out upon mortgage." Mr Hampson received for the plaintiff in respect of the sale of this estate and some timber, the sum of 3361*l.* 15*s.*, and shortly afterwards he wrote and sent to the plaintiff the following letter:

"*Luton*, 27th *Dec.* 1822.

"My dear Sir,

"I have great pleasure in informing you that the Farley purchase is now finally settled. I have in the other side sent you the particulars, with the balance paid to me, amounting to 3261*l.* 15*s.* I will endeavour to obtain very soon a security for this sum; but if I should not be successful, I will transfer to you a mortgage of mine for 3000*l.* In the mean time I will engage to pay you 4 per cent. for the interest of the money until it is invested. I do assure you the settlement of this business has given me much gratification, because I consider that we have made Mr Crawley submit to the original agreement.

"Yours sincerely,

LEO. HAMPSON."

On the 14th of April 1823, and 14th of June 1823, the plaintiff wrote letters to Mr Hampson, pressing him to furnish his account; and in one of which he said, that several years had passed since a regular settlement had taken place between them.

On the 17th of June 1823, Mr Hampson wrote to the plaintiff that he would in a few days make out a statement of the account, and send it with a remittance for the balance, and an acknowledgment that he

held in his hands a mortgage deed for 3000*l.*, with an undertaking to assign it to the plaintiff when required.

On the 15th of July 1823, Mr Hampson sent to the plaintiff a draft for 361*l.* 15*s.*, being the balance of the Farley sale, and on account of some timber sold, accompanied by the following document:—

"15th July 1823.

"I acknowledge to have in my hands a mortgage deed made by Thomas Nicoll to me of an estate at Studham in the county of Bedford for securing the sum of 3000*l.* and interest. And having received this sum of John Sharpe Palmer, Esq. (the plaintiff) in December last, I do hereby undertake, when thereto required by him, to execute a transfer to him of this mortgage.

"Leonard Hampson."

On the 16th of July 1823, the plaintiff wrote to Mr Hampson, acknowledging the receipt of the 361*l.* 15*s.*; and saying that he should be glad to receive a debtor and creditor account, which Mr Hampson had promised on his return home.

In a letter of the 9th of August 1823, the plaintiff alludes to a purchase he had made in Essex, and adds, that it was absolutely necessary he should arrange his affairs, for which purpose he intended to go to Mr Hampson's at Luton, where he resided.

On the 13th of August 1823, the plaintiff wrote to Mr Hampson, stating that he had not received an answer to his former letter, and that he should not have 3000*l.* to put out on mortgage, as he should want 1000*l.* to pay for his late purchase about the middle of September, and that he depended upon that, as the money was left in Mr Hampson's hands as a temporary arrangement, agreeable to Mr Hampson's desire. In October 1823, Mr Hampson sent to the plaintiff the sum of 1000*l.* The mortgage was never assigned to the plaintiff; and in March 1824, Mr Hampson died, and administration to his effects was granted to Scott and Jones, two of the defendants, and they possessed themselves of the mortgage deed; but the defendant Williamson, a partner of Mr Hampson in his business of a solicitor, possessed himself of certain title-deeds relating to the estate in mortgage; and the surviving partner of Mr Hampson, as a banker, having become bankrupt, his assignees, who were also defendants, claimed some lien on the mortgage. The mortgage was in the possession of the administrators.

The bill prayed that the plaintiff might be paid the balance due to him, or that the mortgage might be assigned to him.

Defendant Williamson disclaimed any interest in the deeds.

Mr Treslove and Mr Rawlings for the plaintiff.

Mr Bickersteth, Mr Tinney, and Mr Barber, for the defendants.

The Master of the Rolls. A reference must be made to the Master to inquire what interest Hampson had in the mortgage.

The plaintiff employed Hampson as his solicitor in this purchase. The plaintiff informed Hampson of his intention to lay out the money on mortgage.

(His honour then referred to the letters of the 27th of December 1822, and 15th of July 1823.)

This is a positive agreement, and requires, therefore, no acceptance

in writing. Where there is only a proposal made, it is necessary there should be an acceptance, but where there is a positive engagement, no acceptance is necessary. Unless refused, such engagement constitutes by itself an agreement which this court will enforce. The letter of the 16th July 1823, contains no refusal; on the contrary, the plaintiff in another letter stated that he had accepted that security of Hampson as a temporary arrangement.

His honour then read the letter of the 13th of August 1823.

The mortgage was to be a security until the 3000*l.* was invested by Hampson. There is nothing in the correspondence to show that the plaintiff refused it.

Declare, that the plaintiff is entitled, as a security for what remains due to him for principal and interest, to all such interest as Hampson had in the security alluded to in the letter of the 15th of July 1823. Refer it to the Master to inquire what interest Hampson had in the mortgage at the date of the agreement of the 15th of July 1823, whether he continued to be entitled to the same interest up to and at the time of his decease, and what other interest he had at the time of his death.

Reserve further directions and costs.

Reg. Lib. A. 1829. p. 2129.*

## Newbold *v.* Roadknight.

1 *Tamlyn*, 492.

Devise of land upon trust, to sell the same, and out of the product to pay 3000*l.* to A. The testator sold the estate in his lifetime:
Held, that the legacy was adeemed.
July 26, 1830.

IN this case William Norris deceased, by his will which had been duly executed for passing real estates, after reciting that he had contracted for the purchase of an estate situate at Marton in the county of Warwick, but that he had not paid the whole of the purchase-money for the same, and that the estate had not been conveyed to him, devised all his right, title, and interest therein to William Roadknight and Robert Welchman, their heirs and assigns, upon trust to sell the same, and out of the moneys to arise from the sale thereof to pay the costs, charges, and expenses of the sale, and such part of the purchase-money as might then remain unpaid, and all interest that might be due thereon; and to stand possessed of the surplus upon the trusts thereinafter declared concerning his personal estate, of which he directed that it should form and be considered a part; and after disposing of various other parts of his property, expressed himself in the following words:—"I give and devise all my messuages, closes, lands, tenements, and hereditaments, situate, lying, and being in Eathorpe in the county of Warwick, unto the said William Roadknight and Robert Welchman,

* This decree is to be found in the index to the decrees *only*, under the title of Exton *v.* Scott.

their heirs and assigns, upon trust, as soon as conveniently may be after my decease, absolutely to sell and dispose of the same either by public auction or private contract, and either together or in parcels, for the most money and best price or prices that can or may be reasonably obtained for the same; and, after defraying thereout the costs, charges, and expenses incident to and attending such sale or sales, and in making out good and perfect titles to the purchaser or purchasers, upon trust to pay unto Mr Thomas Newbold of Baggington, the husband of my daughter Elizabeth Newbold, the sum of 3000*l.*, which I hereby give and bequeath to him accordingly, to and for his own use and benefit; and then upon trust to pay and divide the surplus of the said last mentioned purchase-money unto and amongst all and every the child and children of my late son Thomas Norris, and the child and children of my said daughter Elizabeth Newbold, equally to be divided between them when and as they shall respectively attain the ages of twenty-one years, with benefit of survivorship and accruer amongst them;" and, after bequeathing certain legacies, gave the residue of his personal estate to his said trustees absolutely, upon trust to convert the same into money, and to stand possessed thereof and of the surplus of the money to be produced from the sale of the said estate at Marton aforesaid, upon trust to pay his just debts and funeral and testamentary expenses, and to pay and divide the residue thereof unto and amongst the children of his said late son Thomas Norris, and the children of his said daughter Elizabeth Newbold, equally to be divided between them when they should respectively attain their ages of twenty-one years, with such benefit of survivorship and accruer as therein is mentioned; and thereby appointed the said William Roadnight and Robert Welchman executors of his said will.

The testator, after the execution of his will, sold the said estate at Eathorpe, and conveyed the same to the purchaser thereof, and received from him the purchase-money for the same; and subsequently to the completion of such sale, made a codicil to his said will, which was also executed for passing real estates, whereby, after reciting that since he had executed his will the said estate at Marton had been conveyed to him, he devised that estate to his said trustees in fee, and declared that they should stand seised thereof upon such trusts as were expressed concerning the same in and by his said will; and, after bequeathing one pecuniary legacy to his servant, concluded his said codicil with these words:—"And I do in all other respects ratify and confirm my said last will and testament."

The testator, at his death, left his two trustees and executors, and his daughter Elizabeth, who was the wife of the said Thomas Newbold in the will named, and eight infant children of his said daughter Elizabeth, and six infant children of his deceased son Thomas Norris him surviving.

The bill was filed by the said Thomas Newbold and his wife against the trustees and executors, claiming the legacy of 3000*l.* bequeathed to him by the will, making all such infant children also parties defendants.

Mr Pemberton and Mr Wakefield for the plaintiffs, argued that the testator intended Thomas Newbold to have the legacy of 3000*l.* at all events, and that the same was a general pecuniary legacy charged upon

real estate, and that such intention was apparent from his use of the words "which I hereby give and bequeath to him accordingly" contained in the will; and that the subsequent sale of the estate at Eathorpe was only an act which the testator had directed his trustees to do; and that his performing the same in his lifetime ought not to be considered to invalidate his own gift of the 3000*l.*; and that a legacy charged upon real estate did not fail merely from the circumstance of the testator *not being entitled to such estate at the* time of his death, and cited the case of Fowler *v.* Willoughby, 2 Sim. & Stu. 354, as an authority to that effect; and argued that, even if the court should be of opinion that the legacy was adeemed by the sale of the Eathorpe estate, that the gift of the 3000*l.* was re-established by the confirmatory words of the codicil.

Mr Tinney and Mr Jeremy for the defendants, insisted, from the words of the will, that the legacy of 3000*l.* was not a general pecuniary legacy, but was given out of the produce of the Eathorpe estate only; and that, as, according to the case of Page *v.* Leapingwell, 18 Ves. 463 *a.*, a legacy charged upon real estate is a specific bequest, the gift of the 3000*l.* must have failed upon the sale of the Eathorpe estate; and, further, that, as such sale was a revocation of the devise of the realty, the legacy must have been thereby adeemed, and cited as an analogous case Arnald *v.* Arnald, 1 Bro. C. C. 401. They submitted, that the case of Fowler *v.* Willoughby was distinguishable from the present by the circumstance that the gift there was merely pecuniary with a particular security, and that the security failed by accident, whilst, in this instance, the gift of the legacy was not independent of the realty; and that the revocation was the result of an act indicative of intention on the part of the testator himself; and, to show that the words "which I hereby give and bequeath to him accordingly," did not render the legacy so independent, referred to the practice of conveyancers in using such words, and to the case of Hancox *v.* Abbey, 11 Ves. 179. And as to the confirmation of the gift by the codicil, they contended, that since the effect of republishing a will was to make it operate at the time of the republication, the codicil, in this instance, could not re-establish the gift, because it was not merely pecuniary, and the estate upon which it had been charged had then been sold; and that where a codicil sets up a particular gift, confirming the will in all other respects, it does not revive a devise revoked, as appeared from several cases, of which they cited only Irod *v.* Hurst, 2 Freem. 224, and Crosbie *v.* M'Doual, 4 Ves. 610.

The counsel for the infant children of the plaintiffs, upon the last point cited also the case of Monck *v.* Lord Monck, 1 Ball. & B. 306.

Mr Harwood appeared for the trustees and executors.

Mr Pemberton in reply, maintained that the gift was to be considered as a pecuniary legacy not adeemed by the act of the testator, and that the same ought to be paid out of his personal estate; that the cases cited for the defendants were not in point, and that Fowler *v.* Willoughby was the ruling authority on the subject; but lest the court should think that the legacy for any reason failed, insisted that the bequest thereof was restored by the codicil.

[Newbold *v.* Roadknight.]

The MASTER OF THE ROLLS having postponed his judgment to this day (2d of August), after stating the case, declared it to be his opinion, that the legacy was not a general bequest, but a legacy out of the estate at Eathorpe; and that, upon the cases, it was adeemed by the sale of that estate; that the case of Fowler *v.* Willoughby, in which the question was, whether on a charge of a legacy on real estate as a further security, if such security should fail, the fact of its having been so charged would render the gift altogether ineffective, was very distinct in its nature from the present; and, after adverting to the fact of the testator having in the codicil mentioned the completion of his purchase of the estate at Marton, and not having alluded to that at Eathorpe, declared that, upon the intention to be derived from the acts of the testator, and upon the authorities, he was of opinion that the plaintiff, Thomas Newbold, was not entitled to be paid the legacy of 3000*l.* out of any part of the assets of the said William Norris.

Decree, that the plaintiff, Thomas Newbold, is not entitled to the legacy of 3000*l.* in the pleadings mentioned.

Reg. Lib. B. 1829. p. 2463.

## Humphreys *v.* Howes and others.

1 *Tamlyn*, 497.

Bequest of residue upon trust, to pay the dividends to three persons during their lives and the life of the survivor of them; and after their deaths to transfer the principal to A. B., and if either of them died before his share of the trust money became payable without leaving issue of his body lawfully begotten, then his share should go to the survivor and when his original share would become payable. A. died in the lifetime of the testator, B. survived the testator and the persons to whom life interests were given: Held, that B. was entitled to one moiety as his original share, and to the other moiety as having survived A., who died without leaving issue of his body.

*Rolls*, July 12, 1830.

JOHN HUMPHREYS, by his will, bequeathed the residue of his personal estate unto trustees, upon trust to invest the same, and pay the dividends and interest to two of his brothers and his sister during their lives, and the life of the survivor of them, during his or her natural life, and after their deaths to transfer the principal to his two nephews, John Humphreys and John Crow, and if either of them should die before his share of the trust moneys became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor when his original share would become payable; and if both those nephews should die without leaving issue before their shares became payable, then upon trust for the children of his four brothers and of his sister, when they should respectively attain twenty-one. The residue amounted to about 12,000*l.* in different stocks.

The two brothers first mentioned died in the lifetime of the testator, and John Crow also died in the lifetime of the testator, without leaving issue. The testator's sister, and the other nephew, the plaintiff John

Humphreys, survived the testator. The testator's sister died in July 1829.

Mr Tinney, Mr Spence, and Mr Lloyd, for the plaintiffs, contended that the bequest over to the surviving nephew took effect; and cited Humberstone *v.* Stanton, 1. V & B. 385, Walker *v.* Main, 1 Jac. & Walk. 1, and Willing *v.* Baine, 3 P. W. 113.

Mr Pemberton and Mr Bethel, for the next of kin, argued that this case was to be distinguished by the circumstance of life-interests being first given to other persons, and that the testator, in the limitation over to the survivor of the two nephews, in the event of either of them dying before his share became payable, only contemplated the death of one of them after his own death and during the life of the other tenant for life. They cited Corbyn *v.* French, 4 Ves. 418, Bone *v.* Cook, M'Clellan, 168, Cripps *v.* Woolcot, 4 Mad. 11, Miller *v.* Warren, 2 Vern. 207, and Rider *v.* Wager, 2 P. W. 328.

Mr Pattison for the trustees.

The Master of the Rolls. The question is, whether, in the event that has happened, the interest intended for the deceased nephew survived to the other? Upon reference to the cases, I find that the leading case upon the subject is Willing *v.* Baine, 3 P. W. 113; there the testator gave 200*l.* a piece to his children, payable at their respective ages of twenty-one, and if any of them died before the age of twenty-one, then he directed that the legacy given to the person so dying should go to the surviving children. One of them died in the lifetime of the testator, and before twenty-one; and it was held that the surviving children took the whole. That authority was referred to by Sir W. Grant in Humberstone and Stanton, and he there states, that in the case of Willing *v.* Baine, "it was held, and is now settled, that the bequest over takes place." In the argument of the present case of Humphreys and Howes, it is stated, there is this distinction, that in Willing *v.* Baine and Humberston *v.* Stanton there was no previous interest for life; and some cases have been referred to as authority for that distinction, but it does not appear to me that the principle upon which those cases were decided has any application to the present case. The very point in question here has been, in truth, decided in the case of Walker *v.* Maine, which has been referred to in the argument.

Decree, that upon the death of the testator's sister, the plaintiff John Humphreys became entitled to one moiety of the residue as his original share, and to the other moiety as having survived John Crow, who died, without leaving issue of his body lawfully begotten, in the lifetime of the testator.

Reg. Lib. A. 1829. fol. 2098.

## Between Charles Lancelot Hoggart, Thomas Abbot, and T. C. Smith, plaintiffs; and John Scott, defendant.

1 *Tamlyn*, 500.

Houses and lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed the plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The defendant became the purchaser of four of them, and just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir at law of the surviving trustee. The plaintiffs thereupon presented a petition to the court under the statute of 6 G. 4, that the infant might be directed to convey. The plaintiffs apprised the defendant of this proceeding, to which he made no objection. Twelve months elapsed before the Master's report could be obtained, and a short time previously the defendant commenced his action for the deposite, and subsequently recovered it; in the mean time the dilapidations of the houses purchased had increased.

Held, that although the defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the Master's office, the plaintiffs were entitled to a decree for specific performance:

Held, that the defendant was entitled to the amount of the dilapidations:

Held, that the defendant was entitled to costs:

Held, that the plaintiffs were only entitled to interest from the date of the decree, but that they were entitled to the rents up to that date.

*Rolls*, March 9, 1830.

THE plaintiffs Abbot and Smith, by the other plaintiff Hoggart, an auctioneer, sold four lots of houses to the defendant. An abstract of title was delivered to the solicitors for the purchaser, and they prepared the draft of a conveyance, and sent it to the solicitor of the vendors for his perusal, and he having approved and returned it, the purchaser's solicitors had it engrossed. It was soon afterwards discovered by the purchaser of another lot that the legal estate was not in the vendors, but in the infant heir-at-law of one Robert Abbot, the survivor of two trustees to whom this property had been devised by the will of Thomas Bush upon trust for sale. Robert Abbot had made a will, by which he appointed the vendors his executors, but it did not contain any devise that would pass this trust estate, which therefore descended to his infant grandson.

This discovery was made in March 1826, and a petition was presented to the court of chancery, praying that the infant might be directed to convey under the statute of 6 G. 4.; on the 23d June 1826, the court made the usual reference to the Master, but from difficulties experienced in procuring certificates of registry of births, &c. and other circumstances, the report was not completed until the 26th of May 1827. The defendant was apprized that these proceedings were going on. In September 1826, the defendant's solicitors, by letter, called upon the vendor's solicitor to complete the title or return the deposite, and they also

sent letters to the same effect in January 1827, and two or three times afterwards. The vendor's solicitor, in February and March, wrote letters to the solicitors for the purchaser, reporting the progress of the proceedings; and in May 1827, the vendor's solicitor wrote the defendant's solicitors, that he every day expected to receive the Master's report when he would immediately proceed to complete the title, that he had experienced much difficulty in making the same perfect, and that no time had been lost.

A few days afterwards the defendant commenced his action against the plaintiff Hoggart for his deposite.

The Master's report was confirmed in June, and thereupon the vendor's solicitor sent the solicitors for the defendant an abstract of the report, to which they sent no answer, but they proceeded with the action, and at the trial on the 14th July 1827, the jury found a verdict for the plaintiff.

There was evidence on the part of defendant of dilapidations; a surveyor deposed that, in January 1826, there were general dilapidations to the extent of 155*l.*, but that the property was then in tenantable repair; that he again surveyed the property in June 1828, when the premises had become greatly dilapidated, and the principal part thereof so run to waste, as to render it impossible to repair the same. The tenants had, for the most part, quitted the houses.

Mr Bickersteth and Mr Lynch for the plaintiffs, cited Hudson *v.* Bartram, 3 Mad. 440; Wynn *v.* Morgan, 7 Ves. 202; Seton *v.* Slade, 7 Ves. 264, and argued that the defendant having consented to the petition to the court, and concurred in the other proceedings, he had waived any right he might have had to get rid of the contract.

Mr Pemberton and Mr Phillimore for defendants.

It now turns out that the plaintiffs were not trustees for sale; they had neither a legal right nor a beneficial interest; they had no authority for the purpose of selling; they had no right to sell; the trustees died, and the survivor devised his estates to the present plaintiffs; it turns out that the trust estates did not pass by that devise. How is it possible that they can enforce a sale? they have entered into a contract which they not only can not perform, but which they had no right to enter into. Here, the legal estate that has been obtained is not an addition to their interest, but long after the institution of this suit the plaintiffs clothe themselves with a character which they had not at the time of the sale; there are many cases on the point. These plaintiffs not being trustees at the time they entered into the contract, have no right to bind the defendant.

The contract has been rescinded at law, and, since the purchase, the property has sustained considerable dilapidations; they cited Boehm *v.* Wood, 1 Jac. & Walk. 419; Hudson *v.* Bartram, 3 Mad. 440; and Lloyd *v.* Collett, 4 Brown, 469.

The Master of the Rolls. The objections urged are:—

1st. That the vendors had no power to sell.

2d. That there has been unreasonable delay.

3d. That the premises are dilapidated.

[Hoggart *v.* Scott.]

The testator devised to the trustees with a power of sale, and the present plaintiffs, Abbot and Smith, are the personal representatives of the surviving trustee: by a misapprehension the plaintiffs thought themselves clothed with the power of sale. An abstract was delivered in pursuance of the contract; some time afterwards it was discovered, not by this defendant, but by the purchaser of another lot, that the plaintiffs had not the power of sale, and that the legal estate had descended to an infant trustee. The vendors presented a petition under the 6 G. 4., a communication was made to the purchaser that such a petition was presented, he made no objection to that proceeding, and he therefore must be held to have acquiesced in it, provided it was prosecuted with reasonable diligence. Considerable time was occupied in making out the pedigree, and the Master made his report twelve months afterwards.

The plaintiffs were not mere strangers,—they have assumed the execution of the trusts, but without sufficient legal authority.

Those vendors having acquired the legal authority before the hearing of this suit, there is no objection to a decree for specific performance,—the defendant might have retired from the contract on the discovery of the defect in the vendors' title; but he did not do so, he acquiesced in those proceedings which were necessary to clothe the plaintiffs with the legal title, and there is no evidence that reasonable diligence was not used in the Master's office.

I am of opinion, therefore, that on the ground of delay there is no objection.

With respect to the dilapidations, the defendant has a right to an inquiry what the dilapidations are. I am of opinion that the plaintiffs are entitled to a decree for a specific performance, and that the defendant is entitled to an inquiry respecting dilapidations, reserving further directions therein.

The defendant is entitled to the costs of the suit, a good title not having been made at the time of the commencement of the suit.

Decreed, that the plaintiffs are entitled to a specific performance of the agreement. The Master to inquire what dilapidations the premises have sustained since the contract for sale. The Master to tax the defendant's costs, which when taxed, are to be paid by the plaintiffs to the defendant.

Reg. Lib. 1829. A. p. 1541.

The defendant waived all objections to the title. The Master estimated the dilapidations at 175*l.* 10*s.* His report was confirmed. This cause came on for further directions on the 3d December 1830, when the question of interest was discussed; and his honour held, that the defect in title could not properly be called an unforeseen occurrence, and that the defendant had a right to assume that the vendors could make a good title, that it was the fault of the vendors that the premises stood empty; and it was decreed that the defendant should pay unto the plaintiffs Abbott and Smith interest on the sum of 1280*l.*, the purchase-money, from the 9th March 1830 (the time of the decree,) and that the rents up to the 9th March 1830, should be paid to the plaintiffs. The Master to tax defendant's costs of inquiry as to dilapidations, and his subsequent costs, and the plaintiffs to pay the same to the defendant.

Reg. Lib. 1830. A. p. 466.

## Peake *v.* Gibbon.

1 *Tamlyn*, 505.

The provisional assignee is entitled to his costs from the mortgagee, in a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage.

*Rolls*, February 18, 1831.

THIS was a suit by a person beneficially interested in a sum of money secured by a mortgage against the person to whom, as a trustee, the mortgage was made, and the heir at law of the mortgagor, for an assignment of the mortgage by the trustee, and for foreclosure.

The heir having taken the benefit of the act for the relief of insolvent debtors, a supplemental bill was filed against the provisional assignee.

An argument was raised, whether the provisional assignee should be allowed his costs; and the Master of the Rolls said, it would be very hard if he were not allowed them, he being a public officer. His honour made the usual decree for foreclosure, and ordered that the plaintiff should pay the costs of the provisional assignee, and add them to his debt.

Mr Pemberton and Mr Wakefield for the plaintiff.
Mr Hind for the trustee.
Mr Teed for the provisional assignee.

## Thomas Alcock *v.* Richard Taylor.

1 *Tamlyn*, 506.

The plaintiff and defendant held some powder-mills on a lease, which would expire in 1831. The plaintiff filed his bill for a dissolution of the partnership; it was objected by the defendant that the partnership must last during the lease, but the court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant.

February 23, 1830.

THE bill set forth a lease from the Duke of Northumberland to Heneage Legg and the defendant of certain powder-mills and lands on Hounslow Heath, from the 29th of September 1810, for the term of twenty-one years, at the yearly rent of 450*l.* and 100 weight of gunpowder.

This lease was granted for the benefit of the lessees themselves, and Mr Joseph Alcock and a Mr Crawford; each having a certain number of seventy-two shares, into which the trade or business of making and vending gunpowder carried on at the mills had been divided.

In the year 1820, Joseph Alcock became entitled to thirty-five sixtieth

parts of the residue of the term, and defendant Richard Taylor became entitled to the remaining twenty-five sixtieth parts; and they carried on the business up to the time of the death of Joseph Alcock, on the 2d of August 1821.

Joseph Alcock by his will gave all his property to his son of the same name, and he and the defendant continued to carry on the business. On the 20th of December 1822, Joseph Alcock the younger also died, having by his will given all his property to his brother, the plaintiff; and the plaintiff and defendant continued to carry on the business.

On the 13th of July 1827, the plaintiff gave the defendant notice in writing of his desire to settle the accounts of the partnership, and that the partnership should be dissolved.

The bill prayed that the accounts might be taken, the partnership dissolved, the property sold, and the receiver appointed.

The defendant, by his answer, stated that there was an understanding between him and the plaintiff that the business should be carried on during the continuance of the lease, unless an opportunity of selling advantageously to the satisfaction of both parties should occur; and the defendant insisted that that understanding was recognized in the following letter, relative to a proposal made by the plaintiff to the defendant to employ a son of the defendant in the business:—

"*Kingswood.*

"My dear Sir,—I am afraid you misunderstood my object in alluding to your son's going to the gunpowder office; for I can most truly assure you that I have only one end in view, which was intended for your benefit and your son's, for if to-morrow you wrote me word that you wished to wind up the concern, I should be most happy, and certainly I never yet have looked forward to any ultimate advantage in the trade, but have only endeavoured as much as possible to make the best of a bad thing, since it was impossible to get rid of it. I therefore looked forward to 1831 to wind up; although at the same time one can not tell for certain that one may remain of the same opinion. I am, &c.

"Thomas Alcock.

"R. Taylor, Esq., Hounslow Heath."

And the defendant insisted that the business should be carried on during the continuance of the lease.

Mr Bickersteth and Mr M'Arthur for the plaintiff. Lord Eldon's judgment in Crawshay *v.* Maule, 1 Swanst. 508, applies to this case: that learned judge said that "where no term is expressly limited for the duration of a partnership, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party."

Mr Tinney and Mr Barber, for the defendant, contended that there was evidence in the case that the partnership should continue until 1831.

The Master of the Rolls did not consider there was any such agreement, and declared the partnership dissolved from the time stated in the notice.

Accounts to be taken.

Further directions and costs reserved.

## Besant *v.* Richards.

1 *Tamlyn*, 509.

The defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses: Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs.

*Rolls*.—March 30, 1830.

THIS was a suit by a purchaser against a vendor for specific performance of a contract for the sale of an inn, and for compensation. The contract was entered into on the 30th of March 1827, for the sale of the inn, and the other hereditaments held by Matthew Watson, for 1300*l.*; and it was thereby agreed that the title should be made good by the vendor, and the expense of the conveyance borne by the purchaser, and that the sale should be completed at Michaelmas then next.

There was no other stipulation in the agreement. In the previous treaty, the defendant represented to the plaintiff that the agreement under which Watson held the inn was a void agreement, and good for nothing; that he had served Watson with a notice to quit at Michaelmas following, and that he would give the plaintiff possession at that time.

Watson died before the time arrived, and his widow, who was his personal representative, refused to quit, insisting upon the validity of the agreement.

The agreement was for a ten years' term. The defendant had, in fact, given Watson the notice to quit; and several witnesses proved admissions by the defendant that he had made the representation stated.

Mr Pemberton and Mr Richards for the plaintiff.

The defendant represented to the plaintiff that he could give him possession in September; and upon the faith of then having possession, which was his great object, the plaintiff entered into the contract. The case of Dobell *v.* Stevens, 3 B. & C. 623, 5 Dowl. & Ryl. 490, is in point: that was an action by the purchaser of a public house against the vendor, who had made deceitful representations respecting the amount of business done in the public house, and the rent received for the tap: it was held, that the purchaser might maintain an action on the case for the deceitful representations, although they were not noticed in the contract or in the conveyance. Several of the witnesses examined on the part of the plaintiff have sworn to the representations made to him by the defendant, and the mere fact of the defendant having given his tenant notice to quit, shows plainly that he was to put the plaintiff in possession in September. It must be intended from this fact, that the defendant contracted to give the plaintiff possession.

[Besant *v.* Richards.]

Mr Bickersteth and Mr Girdlestone, jun., for the defendant, argued that, as the tenancy of Watson appeared upon the contract, it was the plaintiff's own fault if he did not inquire into the effect of the agreement with him; and contended that the delivery of possession was not an essential part of the contract.

The Master of the Rolls. On the 30th March 1827, the plaintiff enters into an agreement with the defendant for the purchase of the Bull Inn, then in the possession of Matthew Watson; but the plaintiff's case is, that he entered into the agreement with the representation that a prior agreement entered into with Watson was a void agreement. I can not conceive evidence more clear to prove the fact of that representation; and the concurring testimony of all the witnesses makes it evident that the defendant had made an admission of his having made it. The defendant does not deny the representation,—that he did represent that it was a void agreement. The defendant adds in his answer, that he said to the plaintiff, "You had better consult your own solicitor;" but there is nothing in the shape of evidence to prove this allegation in the answer. The effect of the representation is decided by the case of Dobell *v.* Stevens, which has been cited. I am of opinion that the plaintiff ought not to be bound by the agreement, purchasing, as he did, on the faith of that representation. He is entitled to be released from the agreement altogether; or, if he chooses, he may perform it, and have compensation. The plaintiff has his election.

Mr Pemberton elected to take performance with compensation.

The Master of the Rolls. I think you are entitled to take which you please.

Decreed, that the plaintiff was entitled to compensation, and that the contract be carried into effect, and that the Master ascertain what compensation the plaintiff is entitled to in respect of the agreement between defendant and Watson from the 29th of September 1827, to the expiration of the term of ten years, thereby agreed to be granted, and the amount, when ascertained, with the plaintiff's costs, to be deducted from the purchase money.

Reg. Lib. 1829. A. p. 942.

## Wynniat *v.* Lindo.

1 *Tamlyn*, 512.

A party having purchased land, and signified at the time, that he made the purchase on behalf of the trustee in his marriage-settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the cause to proceed until the trustee were made a party; and the cause stood over for that purpose.

*Rolls.*—February 22, 1830.

THIS was a bill for specific performance by a vendor against the defendant, who, in treating for the purchase, disclosed to the vendor

that he made the purchase for another person, who was a trustee in the marriage settlement of the defendant, and who had money vested in him for the purchase of land for the purposes of the trusts of that settlement.

Mr Preston and Mr Barber for the plaintiffs.

The Master of the Rolls. This bill is filed against the defendant personally, to compel him to complete his contract after the disclosure he made that he was merely treating on the part of his trustee. I am of opinion it is unreasonable: that it is not consistent with the practice of the court, and that there is no precedent for it. This cause must stand over to make Mr Lucas, the trustee, a party.

## Bull *v.* Johns.

1 *Tamlyn*, 513.

Bequest of residue to trustees upon trust for testatrix's brother's children, and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years.

M. was herself one of the children of the testatrix's brother:

Held, that the children born at the death of the testatrix took vested interests:

Held, that the testatrix did not mean to include M. as one of the children of his brother.

*Westminster Hall*, June 23, 1830.

MISS POLLY BULL of Cheltenham, made her will bearing date 29th day of December 1823, and by a codicil bequeathed half her furniture, glass, china, &c. to her niece Mary M'Cormick Johns, and also all her clothes and her musical clock. And after giving some pecuniary legacies, the codicil thus proceeded: "And all the rest of my goods, money, and effects wheresoever and whatsoever (excepting 1000*l.* to Henrietta Bull, daughter of my brother James,) I give and bequeath to William Lake, Esq. John Carne, sen., and William Carne, in trust for my eldest brother, John Bull's children, and Mary M'Cormick Johns' children, to be equally divided between them for their separate use; the dividends to be laid out by the said trustees as shall be most advantageous for them, not one farthing of which is to go for their board or education, but to accumulate for them until they come to the age of twenty-one years.

Mary M'Cormick was a daughter of John Bull by a former wife, and she became of age on the 15th of April 1825. At the death of the testatrix she had two children, and she had two others after the death of the testatrix.

At the death of the testatrix, John Bull had three children besides Mary M'Cormick Johns, and he had another after the death of the testatrix.

[Bull *v.* Johns.]

Mr. Bickersteth for the plaintiff, the administrator.

Mr Tinney for Mrs M'Cormick Johns. She is herself entitled to a share as one of the children of John Bull. This is a gift immediately upon the testator's death, and there is nothing in the will to prevent the vesting. Scott *v.* Harwood, 5 Madd. 332; Davidson *v.* Dallas, 14 Ves. 576. The children who were born at the testatrix's death are those who take. I believe it is admitted on all sides that after one child has attained twenty-one, no child born afterwards can take. Now Mrs M'Cormick Johns attained twenty-one in the lifetime of the testatrix.

Mr Wright appeared for the other children of John Bull, who were born at the death of the the testatrix.

Mr Tennant for the two children of Mrs M'Cormick Johns, who were born at the death of the testatrix.

Mr Garrett and Mr Thompson for the children born after the death of the testatrix.

Mrs M'Cormick Johns herself takes nothing. The testatrix plainly intended a provision for those under twenty-one or unmarried, whilst Mrs M'Cormick Johns was a married woman at the time of the testatrix's death, and required neither board nor education. Then it is plain that this is not to be divided until the children attain twenty-one; and when there is that suspense, the court takes advantage of it for the benefit of children born after the death of the testatrix. Pulsford *v.* Hunter, 3 Brown, C. C. 416; Leake *v.* Robinson, 2 Mer. 383; Gilbert *v.* Boorman, 11 Ves. 238; and Curtis *v.* Curtis, 6 Mad. 14. Mrs M'Cormick Johns has a legacy, which is a circumstance indicating that she was to be excluded from the residuary bequest.

The Master of the Rolls. It is quite plain that the testatrix did not mean to include Mrs M'Cormick Johns,—she spoke of children who required board and education. The children born at the death of the testatrix take vested interests. There is no expression in the will that can satisfy a court that the period of division was to be postponed until the children attained twenty-one; but the testatrix meant that the fortune should accumulate. I am of opinion that the children of John Bull, born at the death of the testatrix, except Mrs M'Cormick Johns, take vested interests. The children of Mrs M'Cormick Johns, born at the death, also take; and they take vested interests. Costs to all parties out of the fund.

Reg. Lib. 1829. A. 1897.

# INDEX

OF

# THE PRINCIPAL MATTERS.

ACCOUNT.

A creditor of a person who died intestate in India, took out letters of administration to the deceased, in that country. He then came to England, and obtained letters of administration from the prerogative court. Afterwards one of the intestate's next of kin procured that administration to be revoked, and administration to be granted to himself. Held, that the Indian administrator is compelled to account to him for assets possessed in India as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties. *Sandilands* v. *Innes*, 111

ACCOUNTS.

1, The defendant engaged the plaintiff as second mate of a vessel in the South Sea whale fishery, and the plaintiff was to have a forty-fifth share of the net produce. On the return of the ship, the defendant paid the plaintiff a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. The defendant afterwards discovered that several deductions had been made that were not authorized by the custom of the trade.

Inquiries directed, whether the deductions made were authorized by the custom of the trade.

Held, that the bill having been filed by the plaintiffs on behalf of himself and the others of the crew, and no case for equitable relief having been made as to the others of the crew, the bill, as to them, to be dismissed. *Spittal* v. *Smith*, 275

2, The master of a vessel in the South Sea whale fishery, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of the net produce, sell a quarter of the cargo at 52*l.* per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the plaintiff, being apprised of it, settled accordingly.

Held, that the owners had no right to sell a part of the cargo on their own account,

ACCOUNTS.

they being only entitled to a share of the produce; but the plaintiff, having settled, was too late for relief in equity. *Cockle* v. *Whiting*, 280

3, By the act of 59 G. 3, c. 111, navy agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. The defendants having received 450*l.* as two and a half per cent., returned premium on 18,000*l.* in 1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average, referred to the Master, to inquire whether he was entitled so to retain it, according to the usage and custom of merchants. *Drury and another* v. *Atkins and another*, 291

ACCUMULATIONS:

A. by his will, in October 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities. There were at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was prior to his death reduced to 3*l.* 10*s.* per cent.

Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. still existing.

The testator having declared that the dividends should accumulate during the life of his daughters, and until their children respectively should attain twenty-five, when the principal should be transferred to the children, the court directed the dividends to accumulate for twenty-one years, if the daughter should so long live; but the court would not decide on the question of remoteness, as, if the daughter left no issue the question would not arise, and the court will not decide an hypothetical case. *Banks* v. *Sladen*, 454

ADEMPTION.

Devise of land upon trust, to sell the same, and out of the product to pay 3000*l.* to A. The testator sold the estate in his lifetime:

Held, that the legacy was adeemed. *Newbold* v. *Roadknight*, 498

ADVANCEMENT.

Interest at 4 per cent., directed to be computed on advancements made by a father to his children, from the time when the father's property was divisible amongst them. *Andrewes* v. *George*, 169

AGREEMENT.

An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook when thereunto required, to execute a transfer of the same.

Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein. *Palmer* v. *Scott and others*, 497

AMENDMENT.

1, An application to amend, under the 13th order, must be supported by a joint affidavit of the plaintiff and solicitor. *Browne* v. *Dunn*, 12

2, On 19th April 1828, plaintiff obtained an order to withdraw replication and amend, and amended accordingly. In 1829, he obtained, as of course, another order to amend. Motion to discharge the second order refused, the first having been made before the new orders came into operation. *Leith* v. *Wildman*, 33

AMENDMENT.

3, In general, a motion to amend a second time after answer, can not be made without notice.

In what cases notice of a motion to amend a second time is not necessary. *Freame* v. *Best*, 56

4, A defendant against whom a *subpœna* is prayed, on his coming within the jurisdiction, is not, in substance, a party to the suit; and therefore the bill can not be amended after the expiration of six weeks from the time when the last of the answers of the defendants, who are within the jurisdiction, is to be deemed sufficient, though the other defendant may not have answered. *The King of Spain* v. *Hullett*, 143

5, The amendment of a bill under leave given on the allowance of a demurrer, is not reckoned for the purposes of the 13th order. *Pesheller* v. *Hammett*, 169

ANNUITY.

1, A testator directed that an annuity of 250*l.* should be purchased for his wife within three months after his decease. She survived him seven months; but the annuity had not been purchased at the time of her death. Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the court decreed accordingly. *Dawson and others* v. *Hearn and another*, 484

2, But if an annuitant has received the annual sum, the court will direct an inquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum. *Ibid.*

3, It makes no difference whether a certain sum is given to purchase an annuity, or a certain annuity is directed to be purchased; and the court considers it a legacy to the amount of its value: but the annuitant may waive it, and receive the annual sum from the executors, 486

4, The annuitant does not waive his right to have the annuity purchased, by consenting to receive the annuity until the purchase should be made. *Ibid.*

ANSWER.

The original bill sought to set aside an appointment on the ground of fraud. The plaintiff then amended his bill, and inquired as to the mode in which the appointment was executed and attested. Held that the plaintiff's case being one of legal validity and equitable invalidity, the inquiries were irrelevant, and therefore need not be answered. *Codrington* v. *Codrington*, 229

APPOINTMENT.

1, By a marriage settlement, a fund was vested in trustees, in trust for all and every the child and children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions and limitations, as the wife, in case she survived her husband, should appoint. There was one child only of the marriage. The wife appointed the fund to that child, for her separate use, for life, and, after her decease, to such persons as the child should appoint, and, in default of such appointment, to the executors or administrators of the child. Held that the power in the settlement was well exercised. *Bray* v. *Hamersley*, 226

2, A. having power to appoint 700*l.* which was to be raised under the trusts of a term, by her will, appointed that sum, to the persons whom she made her executors, *in trust;* but she did not declare, expressly, any trust of that sum. She then bequeathed her personal estate to the same persons, in trust, and subject to the payment of her debts and legacies. Held, in suit instituted by the legatees, that the 700*l.* ought to be raised, and applied in the same manner as the testatrix's personal estate. *Goodere* v. *Lloyd*, 239

ASSETS.

1, A testatrix, who died in 1782, gave an annuity to A. B. and devised her real estates to M. and his sons, in strict settlement, and bequeathed her personal estate to M. absolutely. Down to 1821, the annuity was paid by the persons in possession of the real estates, and no fund for payment thereof was ever set apart out of the testatrix's personal estate, although that estate was administered in a suit instituted by her legatees, to which A. B. was a party, and in which the annuity was erroneously considered as not primarily charged upon the testatrix's personal estate. M. bequeathed his personal estate to L. and died. L. afterwards died, and one of the defendants was her executrix: Held that A. B. had no claim upon L.'s estate, in respect of his annuity. *Brown* v. *Claxton*, 93

2, It is a general rule, that personal estate is first liable to the payment of mortgages in exoneration of the real estate mortgaged, 326, *n*

3, And next, the real estate descended is liable, unless the debts are directed to be paid out of the lands devised, and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts. *Ibid.*

4, If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the court will not disappoint the intention. *Ibid.*

5, The personal estate of a son, on whom lands in mortgage descended, is not liable to the payment of the mortgage moneys. *Ibid.*

6, And the personal estate of a devisee of lands mortgaged by the devisor or his ancestors, is not liable to the payment of the mortgage money. *Ibid.*

7, The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgages, 327, *n*

8, Unless the intention of the purchaser appears to be to make the debt his own. *Ibid.*

9, The distinction seems to depend upon communication with the mortgage, or some other act done by the party to make the debt his own. *Ibid.*

10, A mortgage upon a man's estate not of his contracting, is not considered his debt, payable primarily out of his personal estate. *Ibid.*

11, On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate, as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust to sell and pay debts generally, does not exempt the personal estate. *Ibid.*

12, With respect to a devise upon trust for sale to pay debts generally, Lord Thurlow, in the case of Hale *v.* Cox, (3 B. C. C. 322) appears to have drawn a distinction on this point as against different characters,—legatee of personal estate, and next of kin,—expressing an opinion in favour of an exemption of legatees from the payment of a mortgage debt under the circumstances of that case; but, in the case of next of kin, charging the personal estate with the mortgage; and in subsequent cases (Gray *v.* Minnethorpe, 3 Ves. 103; Burton *v.* Knowlton, 3 Ves. 106; Brummel *v.* Prothero, 3 Ves. 110,) Sir Richard Pepper Arden, Master of the Rolls, recognized and acted upon the distinction, exempting the personal estate where specifically bequeathed, but subjecting it to mortgages where the personal estate went to the executor without any particular powers or appropriations; and in one of those cases the same learned judge said, he was not one of those judges who thought there was much difference between a charge for debts and a devise for payment of debts, unless there were demonstration that the personal estate was intended to be exempted. *Ibid.*

13, In order to exempt the personal estate, the judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate; and circumstances *dehors* the will, ought not to be called in to assist the

ASSETS.

explanation: the judge will not look out of the will as to the state of the testator's affairs. *Ibid.*

ATTORNEY AND CLIENT.

1, A., having purchased land, left the investigation of the title to C. and D., solicitors, in partnership. They advise that a good title can be made, and the purchase is thereupon completed. D., the solicitor, was a trustee in the conveyance to bar dower. A. dies, and his devisee sells the property to D., one of the solicitors. D. did not object to the title until eight months afterwards; in his answer he said, he had no recollection of the title:

Held, that a solicitor, who has been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal.

Decree for specific performance. *Beevor* v. *Simpson*, 288

2, An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right.

Decreed to convey to his client, the plaintiff. *Lees* v. *Nuttall*, 392

3, A solicitor having purchased a property of his client at an under-value, the client eighteen years afterwards brought his bill to set aside the sale.

The court was of opinion that a solicitor dealing with his client was bound to show that he had given his client the price which he would have advised him to accept from another person; but the plaintiff having failed to show that he was not in a situation during the time which had elapsed to seek relief, the court dismissed the bill, but without costs.

*Semble.* Had the plaintiff applied to the court in a reasonable time, or had the court been satisfied by evidence of his total inability to take proceedings in this court, he would have had relief. *Champion* v. *Rigby*, 462

BANK ANNUITIES.

A testator having given four *per cent.* stock, and he not having as much at the time of his death, by reason of the reduction of interest in one of the four *per cent.* stocks to three and an half *per cent.* by act of parliament:

Held, that the legatee was entitled to his legacy in the existing four *per cents.* *Banks* v. *Sladen*, 454

BANKRUPT.

1, In an action brought against J. T. by the defendants, a verdict was taken against him for 10,000*l.* subject to an award. J. T. then became bankrupt, and afterwards the award was made, by which the amount of the damage was reduced. It did not appear that the assignees went in before the arbitrator: Held that they were not bound by the award. *Dod* v. *Herring*, 52

2, A bankrupt had been made a party defendant in a suit after his bankruptcy. He set up a claim on his answer to a life interest under the settlement on his marriage, yet it being manifest that he had no interest, all his estate having passed to the assignee under the commission against him, and who was before the court, the Master of the Rolls dismissed the bill as against the bankrupt with costs. *Bennett* v. *Low*, 370

3, A commission was issued against two partners, subsequently a commission was issued against one of them and three other persons: this latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser ob-

BANKRUPT.

jected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance. *Burlton* v. *Wall, clerk*, 311

4, The 16th section of the bankrupt act was made for the purpose of giving validity to a commission of bankrupt, which in its origin was not valid. *ibid.*

5, The Master of the Rolls has no authority to reverse the Vice Chancellor's order to supersede a commission of bankrupt, or to re-hear the order. *ibid.*

BENEFIT SOCIETY.

The word "insolvent," in 33 Geo. 3, c. 54, s. 10, means a person who has taken the benefit of an insolvent debtors' act; and not one who has merely made an assignment of his effects for the benefit of his creditors. In re *Birmingham Benefit Society*, 185

BOND.

1, Obligees in a bond held entitled to be paid out of the assets of a deceased obligator, a sum exceeding the penalty of the bond. *Jeudwine* v. *Agate*, 45

2, Where an obligor has, by vexatious proceedings, delayed the obligee from recovering on his bond, a court of equity will decree payment of the full amount of principal and interest, although it exceeds the penalty of the bond. *Grant* v. *Grant*, 144

BOUNDARIES.

1, Where a plaintiff shows a title to some land and a confusion of boundaries, he is entitled to a commission or an issue. In this case a commission was directed. *Godfrey* v. *Littell*, 361

2, So also in *Morris* v. *Leneve*, where freehold and copyhold were intermixed, 368

3, So also in *Millard* v. *Pancoast*, to distinguish freehold from allotments under an inclosure, 368

4, And, in *Robinson* v. *Hodgson*, to distinguish freehold from customary, 368

5, To distinguish freehold lands. *Att. Gen.* v. *Bowyer*, 369

6, To distinguish manors. *Clifton* v. *Gwynne*, 369

CHARITIES.

1, A., by her will, gave 7000*l.* to the governors of Christ's hospital, upon trust, for certain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of Christ's hospital.

In case the governors refused to accept the trust, then the 7000*l.* was given to the trustees of the Rev. William Hetherington's charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purpose of the latter charity.

The testatrix also gave 2000*l.* to the university of Oxford.

The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum.

The university also refused to accept the legacy of 2000*l.*

Held, that whenever a charitable legacy, from whatever cause, fail, the crown has a right to interfere, and that the legacies of 2000*l.* and 40*l.* per annum must be applied to such charitable purposes as the crown shall direct.

Held, that as to the 7000*l.*, a reference be made to the Master to appoint new trustees.

The bill dismissed as against the governors, trustees, and university.

When there is a doubt about the indentity of a legatee, the court will direct an inquiry at the expense of the person requiring it. *Denyer* v. *Druce*, 270.

2, A., by each of two several codicils to his will, directed his just debts to be paid,

CHARITIES.

and, in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other he gave 200*l.* to the same charity: Held that the legacies were not accumulative, and that the latter legacy was only a substitution of the former. *Simon* v. *Barber*, 260

3, The charitable object having failed, the court will not apply the funds. Where a charitable object fails, from whatever cause, the crown has a right to interfere. The crown must signify the charitable purpose the fund shall be applied to. *Ibid.*

4, The court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity.

Legacies to charities in Ireland are administered by commissioners there, under an act of the Irish parliament. *Collyer* v. *Burnett*, 292

5, The mayor, bailiffs, and burgesses of Berwick-upon-Tweed, in consideration of 50*l.* left by will for the erecting and maintaining of a house of correction there, by feoffment dated 28th May 1653, conveyed the moiety of a property there to the church-wardens and overseers for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c. conveyed the other moiety, and some other lands, for the like purposes:

Held, that this town never having at this time raised poor rates under the statute of Elizabeth, these were gifts in aid of the poor rates.

As to a part of the land, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate chest. The court being satisfied upon the evidence it was intended to be comprised in the second feoffment, the court declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses. The extra costs of the relators to come out of the fund. *Attorney-General* v. *Corporation of Berwick-upon-Tweed*, 372

6, A legal fee can not be created in individuals without the use of the word "*heirs*," or some expression which is equivalent to the effect of the term "*heirs*," but with respect to charitable trusts, the court does not adhere to form. *Ibid.*

7, Generally speaking, gifts for the use of the poor are not gifts in aid of the po or rates. *Ibid.*

8, Testator directed the produce of his real and personal estate to be invested.

Part of the personalty consisted of mortgages and securities on real and leasehold estates.

Part consisted of a sum of money due on a covenant to sell a freehold house.

Testator gave various legacies to charities.

He also gave the residue to charities.

Held void as to the mortgages and money due on the sale of the freehold.

The charities to abate *pro ratâ* in respect of the legacies and residue. *Harrison* v. *Harrison*, 387

CHILDREN.

Who take by that description, 387

CONDITION.

In 1724 a testator gave 400*l.* per annum to the governors of Christ's Hospital, upon

CONDITION.

condition that they received four boys or girls annually, to be nominated by the relators. They received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them:

Held, that this was a gift upon condition, and having accepted the gift, they were bound to the condition. *Attorney-General* v. *Christ's Hospital*, 446

CONFIRMATION.

1, A merchant, being abroad, empowers certain persons in this country to receive monies, adjust claims, and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposite the deeds with the Hope Insurance Company to secure 12,000*l.*, and covenant that he shall execute the mortgage; this 12,000*l.* was also secured by the bonds of sureties in sums corresponding to the shares of the partners.

The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the Hope Company, requesting the loan of 6,000*l.*, "to be secured on his Essex property, which you now hold, in addition to the 12,000*l.* already advanced;" and professing his readiness to execute the mortgage-deed:

Held, that this was a confirmation of the security.

Some of the parties having paid the amount of the sums secured by them:

Held, that they had a lien on the property.

One of those sureties being a partner:

Held, that the sum paid by him was subject to the partnership accounts. *Munnings* v. *Bury*, 329

2, Held, that acquiescence in a transaction can not be maintained unless it be shown that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest. *Cockerell* v. *Cholmeley*, 468

3, Acquiescence does not cure a defect, where the party was at the time wholly ignorant of rights which were in him. *Ibid.*

CONSIDERATION.

1, Inadequate consideration is no ground for relief in equity in respect to the sale of a property in mortgage to the mortgagee, although the mortgagor be in distress, if no advantage be taken, 270

2, But it is a ground for making void a sale of a reversion, and there it is incumbent on the purchaser to prove the value, 432

CONSTRUCTION.

1, A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written: Reference directed to ascertain what was meant, the master taken to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechey*, 12

2, A testator after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S. S. and his heirs. Held that S. S. was entitled to the fund for payment of the annuity, as well as to the house and furniture. *Oldman* v. *Slater*, 25

3, A bequest of a reversionary interest in personality to an executor, affords a presumption that the testator intended to exclude him from the residue. But parol evidence is admissible to rebut the presumption. *Ibid.*

4, Bequest to J. A. for life, remainder to his eldest son, for life, and to remain entailed on the eldest son of J. A. and his posterity for ever. But in case of the

death or want of issue of J. A. to M. (a brother of J. A.) and his descendants as above mentioned from one generation to another for ever. J. A. survived the testator and died a bachelor: Held that the bequest over to M. and his descendants was void for remoteness. *Monkhouse* v. *Monkhouse*, 41

5, By a marriage settlement a term was created for raising portions for daughters, in case the father should die without issue male, such portions to be paid at 21 or marriage, but if the daughters should attain that age, or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained 21 and married, and afterwards died in her father's lifetime: the father died without issue male: Held, nevertheless, that the daughter's representatives were entitled to her portion. *Fry* v. *Lord Sherborne*, 102

6, Leave given, before publication, to examine a witness (who had been examined and cross-examined) as to circumstances brought to his recollection, after his examination in chief. *Cockerell* v. *Cholmeley*, 136

7, A testator, resident in Jamaica, devised the rents, issues and profits of his estate, called Islington and Cove's Pen, in that island, to A. B. Held that the estate and the slaves, mules, cattle and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 172

8, Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining 21; and, in case of the death of either of them before that period, the legacy to be divided amongst the survivors. Held, that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them a separate legacy to that amount. *Ibid.*

9, Devise of "one moiety of the rents, issues and profits of my estate, named I., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues and profits of my said estate I give to R. and his heirs." Held that the grandchildren take the fee as tenants in common, in a moiety of the estate. *Ibid.*

10, A testator, having one nephew and one niece, and eight great-nephews and nieces living at his death, gave one tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children, at 21; and he empowered his trustees to apply all or any part of their respective shares, for their advancement. Held that all the great-nephews and nieces born before the eldest attained 21, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 183

11, Testator gave the yearly sum of 2,000*l.* sterling, to his wife for her life, and, after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.* He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, and, after her decease, for her children. The trustees invested 100,000*l.* five per cents., to answer the two yearly sums. The stock was afterwards converted into four per cents., whereby the dividends became insufficient to pay the yearly sums. Held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. *Kendall* v. *Russell*, 187

12, Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable to them at 21, and those of the girls at 21 or marriage, and to accumulate for them in the mean time, with benefit of accruer and survivorship: and, in case of the death of all the said children except one, before their shares became vested, then

CONSTRUCTION.

upon trust to transfer the whole to the survivor, at the age or time aforesaid. Held that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained 21 or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 215

13, Testator bequeathed his residuary estate to trustees, in trust to pay the income of one third part to his daughter Sarah, for life, and, upon her death, to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining 25; but in case his daughter should leave but one child her surviving, then the whole of the one third part to go to such only child, on his attaining 25, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain 25, then over: Held that the children were not intended to take vested interest until they attained 25, and that, therefore, the bequest to them was void for remoteness. *Judd* v. *Judd*, 232

14, A testatrix directed her residuary estate to be divided into three equal shares, and gave one share to the children of I. M.; one share to the children of W. H. (subtracting from their share the 2,000*l.* that W. H. owed to the testatrix), and the remaining third part to the children of R. H. Held that the 2,000*l.* was to be considered as part of the residue; that the residue was to be divided into three equal parts, and that the 2,000*l.* was to be taken as part of the share of the children of W. H. *Murray* v. *Samson*, 237

15, By a drainage act, the commissioners were empowered, when required for the purposes of the act, to purchase, and to make satisfaction for damage done to lands, and if the land-owners refused to treat, then to apply to two magistrates to issue their warrant to the sheriff to summon a jury to ascertain the amount of the purchase-money or satisfaction. By a subsequent section, if the land-owners and the commissioners could not agree as to the compensation for damages done by the commissioners, the same were to be ascertained by a jury *to be impannelled as aforesaid:* Held that, in that case, the owners of the lands damaged, and not the commissioners, were to apply to the magistrates. In re *Eau Brink Drainage*, 192

16, Testatrix bequeathed to A. B. & C. D. "50*l.* each of Bank Long Annuities Stock, now standing in my name." Held that each of the legatees was entitled to a specific legacy of 50*l.* Long Annuities; and that evidence of the state of the testatrix's assets was not admissible. *Boys* v. *Williams*, 251

CONSTRUCTION OF SIXTEENTH ORDER.

Defendant moved to dismiss the bill for want of prosecution. Plaintiff undertook to speed. There was time sufficient to file a replication on the same day: but none was filed till the next day: held that the defendant was entitled to draw up the order of dismissal. *Allen* v. *Wilkes*, 117

COPYHOLDS.

In two manors in Durham there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeazance, that the surrender is to the uses of the surrenderor's will. In this case, the father and maternal grandfather of the testator R. N. being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeazance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N. in fee. The widow

COPYHOLDS.

being alive at the time the testator R. N. made his will, and died, it was held, that the copyholds in the manor of Houghton passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator, R. N.: Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor: Held, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance; but they taking benefits under the will, were bound to elect. *Nicholson* v. *Nicholson*, 411

COPYRIGHT.

1, The court does not give an account of the sale of a pirated copy of a work, unless it grants an injunction.

The injunction is the ground of the accounts.

That injunction may be granted at the hearing.

The account is consequential.

The court will not grant an injunction after a considerable lapse of time; and where a piracy is only of a small part of a work, and is itself a matter of calculation, the court was of opinion that to interfere would not be a fair exercise of its jurisdiction. *Baily* v. *Taylor*, 399

2, With respect to a work of calculations, if there were previously similar calculations, yet if they were calculated by the author, although calculated by another person before him, they are a work of computation as to which he is to be protected by the statute, 401, *n*

3, A work published in 1811, the court would not prohibit in 1829. *Baily* v. *Taylor*.

COSTS.

1, Where a bill sought either to charge the surviving executors of a testator, personally, with a demand, or to have the debt paid out of the assets of the testator; and the court decided that the surviving executors were personally liable; held that the representatives of a deceased executor were entitled to have the bill dismissed against them with costs. *Bradly* v. *Heath*, 241

2, A. agrees to lend B. 3000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l.* in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l.* and interest:

Held that he was not entitled to the title, but only a specific performance of the contract, as proved; and that the plaintiff, not obtaining the decree he asked, shall pay the costs. *Bass* v. *Clivley*, 292

3, It is a frequent practice to give costs against a plaintiff who has a decree; the real question being, by whose fault were the costs incurred? *Ibid.*

4, Costs refused to the heir at law, he having conveyed his interest to two of his sisters. *Barton* v. *Croxall*, 338

5, The provisional assignee is entitled to his costs from the mortgagee, in a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage. *Peake* v. *Gibbon*, 507.

COUNSEL, CONSENT OF IN COURT.

1, Where such consent has been signed by counsel on both sides, it lies on the party impeaching it to disprove it, *Elworthy* v. *Bird*, 271

2, In the absence of evidence, the court will conclude that the counsel had authority; for it is not to be presumed that counsel would enter into an agreement without authority. *Ibid.*

CROSS REMAINDERS.

An estate being devised in remainder to daughters in tail, and in default of isue, then over: Held, that nothing went over until there was a general failure of issue of all the daughters, and, consequently, that there were cross remainders between them. *Livesey* v. *Harding*, 482

CUSTOMARY ESTATES.

A lord of a customary manor *for life only*, purchased a tenement in the manor in fee, by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter. The manor, by the settlement under which he held it for life, was limited in default of sons in remainder to his brother; and the manor went over to his brother:

Held, that the usual mode of passing estates being by common-law conveyance, the freehold was in the tenant.

Held, that on the death of the lord the tenement descended to his daughter, his heiress at law. *Bingham* v. *Woodgate*, 349

CUSTOMARY FREEHOLDS.

A. seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted, for A., and, after his death, for the purposes of his will: but B. executed no declaration of trust. A. made a general devise of all his real estates; and after A.'s death, B. was admitted. Held that he was a trustee for the devisees, and not for A.'s customary heir. *Wilson* v. *Dent*, 160

DEBTOR AND CREDITOR.

1, A conveyance by a debtor, to trustees for payment of scheduled creditors, who do not execute the deed, or conform to its terms, can not be enforced by the creditors. *Garrard* v. *Lord Lauderdale*, 1

2, A father conveys his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee. The annuities were mentioned in a schedule, but the annuitants were not parties to the deed. The father and son then executed other deeds, varying the former trusts: Motion by one of the scheduled creditors, to restrain the trustees from executing the trusts of the subsequent deeds, until they had performed the trusts of the first, refused. *Walwyn* v. *Coutts*, 7

3, Obligees in a bond held entitled to be paid out of the assets of a deceased obligor, a sum exceeding the penalty of the bond. *Jeudwine* v. *Adgate*, 45

4, Husband and wife being lessees of a rectory, assign it to trustees, in trust, to sell and pay certain bonds of the husband and mortgages on his freehold estates: and by deed of even date, the husband in consideration of his wife having joined in the assignment, conveys his freehold estates in trust for himself and his wife for their lives, and, after their deaths to be sold for benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds and mortgages: Held that the bond-creditors had no right, as against the children, to throw the mortgages upon the produce of the freeholds. *Boazman* v. *Johnston*, 163

5, B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr G. interest for the same, at *5l.* per cent., until the same is settled." Held that the executors were personally liable to pay the debt and interest. *Bradly* v. *Heath*, 241

DEFENDANT.

1, A defendant who had taken out three orders for time to answer, and then pleaded, refused further time, on the plea being overruled. *Mackworth* v. *Marshall*, 157

2, If a plaintiff reads a passage in an answer, which does not refer to, but is qualified by, a subsequent passage, the defendant may read the latter passage. *Rude* v. *Whitchurch*, 251

DEMURRER.

The dean and chapter of C. being rectors of a parish, leased all the tithes belonging to the rectory: the lessees filed a bill for tithe of hops, against the occupiers, to which the vicar was made a party as claiming that tithe. The occupiers then file a cross bill against the dean and chapter and their lessees, for a discovery and production of documents: Demurrer by the dean and chapter allowed. *Tooth* v. *The Dean and Chapter of Canterbury*, 25

DISMISSAL OF BILL.

1, Upon a motion to dismiss, the delay in prosecuting the suit was satisfactorily accounted for. The court refused to make any order upon the motion, or to require the plaintiff to undertake to speed. *Vent* v. *Pacey*, 165

2, Last answer filed 30th November 1829. On the 17th February 1830, defendant gave notice to dismiss. Two days afterwards, plaintiff obtained order to amend. Motion to dismiss granted. *Swinfen* v. *Swinfen*, 169

EQUITABLE RELIEF.

1, J. L., by his will, devised his manors to trustees upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees to preserve contingent remainders; with remainder to the *second* and other younger sons of J. H. L. in tail male.

There was no limitation to the first son of J. H. L., but the declaration of the trust of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then J. H. L. might raise money for the portion of younger sons or daughters:

Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father. *Langston* v. *Pole*, 314

2, A court of equity has no jurisdiction to correct a mistake in an instrument where the parties have proceeded upon error in point of law. The only jurisdiction a court of equity has for correcting mistakes in deeds is where the drawer of the deed, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed, 472

3, A. agreed to lend B. a loan of 600*l.* navy 5 per cent. stock. He sold the stock for 522*l.*, which he paid to B. A bond is drawn by an unprofessional man to repay "the sum of 522*l.*, (being the produce of 600*l.* stock, 5 per cent. navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but B., on discharging the bond, refused to transfer the stock, and would only pay the money received by her; to this A. objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond:

Held, that A. had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but the costs were refused. *Barham* v. *Munn*, 295

EVIDENCE.

1, Testatrix bequeathed to A. B. & C. D. "50*l.* each of Bank Long Annuities Stock, now standing in my name." Held that each of the legatees was entitled to a specific legacy of 50*l.* Long Annuities; and that evidence of the state of the testatrix's assets was not admissible. *Boys* v. *Williams*, 251

A legacy having been given to a legatee in a name which she had for many years assumed, the court will direct an inquiry, who was the person meant.

The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest. *Neathway* v. *Ham*, 410

EXAMINATION DE BENE ESSE.

Motion by a defendant, before answer, to examine a witness *de benne esse*, granted. *Bown* v. *Child*, 197

EXCEPTIONS.

1, Can not be taken to a report of good title, on the ground that the heir at law was not a party to the suit, 258 *n*

2, The eighth of Lord Lyndhurst's orders applies only to the answer to exceptions. *Fosbrooke* v. *Balguy and others*, 468

EXECUTORS AND ADMINISTRATORS.

1, By a marriage settlement the ultimate trust declared of a copyhold estate, (the property of the husband,) was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate which was her property. The wife survived and took out administration to her husband: held that she was not entitled to hold the former estate, for her own exclusive benefit, but for the benefit of herself and her husband's next of kin. *Wellman* v. *Bowring*, 138

2, A bequest of a reversionary interest in personality to an executor, affords a presumption that the testator intended to exclude him from the residue. But parol evidence is admissible to rebut the presumption. *Oldman* v. *Slater*, 27

3, B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr G. interest for the same, at 5*l.* per cent., until the same is settled:" Held that the executors were personally liable to pay the debt and interest. *Bradly* v. *Heath*, 241

4, Executors having contracted to purchase land, sell out stock, and deposite the produce at a banker's when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail. *France* v. *Wood*, 343

5, One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor, he is not liable for moneys which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over. *Davis* v. *Spurling*, 349

6, If there be more than one executor, and one executor receives part of the personal estate, and afterwards hands it over to a co-executor, who wastes the property so handed over to him, the executor who did hand it over, is personally liable for the abuse of trust in the other executor, 355

7, Executors depositing moneys belonging to the estate, with the same persons as the testator entrusted with his moneys in his lifetime, although they are not bankers,

EXECUTORS AND ADMINISTRATORS.

are not liable for a loss sustained by their bankruptcy. *Dorchester* v. *Effingham*, 390

8, An executor is not chargeable unless he acted from corrupt motives, or *crassa negligentia*. *Ibid.*

9, It is not the practice of the court for executors themselves to apply to pay moneys into court. *Ibid.*

10, A person appointed with another executor, and who disclaims, but who does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed with costs. *Dover* v. *Everard*, 437

EXECUTORY BEQUEST.

1, Gift to a wife, and if she make no disposition of it, then over:

Held, an absolute gift. *Bourn* v. *Gibbs*, 457

2, In some of the older cases, the question seems to have been influenced by the fact, whether the first taken had or had not received an absolute power over the property, or shown an intention to make it absolutely his own, 457, *n*

FAMILY ARRANGEMENTS.

With respect to them, the court does not attend to the points which it requires in other agreements, 398

FEME COVERT.

1, A married woman being entitled to an annuity charged on an estate belonging to A., but of which her husband was, as she knew, in receipt of the rents, under a power of attorney from A., made no demand upon A. in respect of the annuity, for several years. The husband being indebted to A. in respect of his receipts, becomes bankrupt. Held that, as the wife had lived with her husband, and enjoyed the benefit of his expenditure, she had no claim, upon A. or his estate, in respect of the arrears of the annuity. *Carter* v. *Anderson*, 159

2, Stock settled on marriage to the separate use of the intended wife, and afterwards as she shall appoint. She assigned her life-interest to two persons for certain purposes, and appointed the capital to the same purposes.

Decreed, that the trustees transfer the stock accordingly. *Lynn* v. *Ashton*, 410

3, Bequest to a married woman to her separate use. The court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to her to apply. *Owen* v. *Lys*, 452

FINES FOR REWARD.

T. H., by his will, devised certain freehold and leasehold property to a trustee, upon trust, to permit his son, T. E. H., to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same; remainder upon trust for the sons of T. E. H. in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2000*l.* subsequent to the bankruptcy for rents: Held, that these rents were liable to the fines for renewal. *Hulkes* v. *Barrow*, 384

FOREIGN JUDGMENT.

A foreign judgment can not be questioned in the courts in this country. Therefore a bill for a discovery and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment is demurrable. *Martin* v. *Nicolls*, 198

FRAUD.

J. S. M. being entitled to the dividends for 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment, to his next of kin, and being in prison for debt and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1000*l.*, and other sums therein stated to have been previously lent and advanced to him by H. C.

By a subsequent deed, in consideration of 1854*l.* therein stated to be due from J. S. M. to H.C.; and of 1000*l.* paid by J. L. M. and others, J. S. M. by the direction of H. C., appointed that the principal should, on his death, be transferred to J. L. M. and others, with a proviso that they should assign the same to H. C. on payment of 1000*l.* and interest, and all further advances.

The 1854*l.* or any part of it had not in fact been advanced by H. C.:

Held, that this was a clear fraud:

Held, that the appointment was well executed.

That the next of kin of J. S. M. had no claim.

That H. C. was a trustee for the personal representatives of J. S. M. for the excess beyond the money received by J. S. M.

That H. C. should pay costs. *Meller* v. *Minet*, 493

GRANTOR AND GRANTEE.

1, In 1711, a mortgage for a term of years, was made to A. In 1712, a mortgage in fee of the estate, was made to S. in trust for A. In 1714, the term was assigned to C. in trust for A. to attend, &c. and then the equity of redemption, in fee, was conveyed to A. In 1717, A. reciting that he was seised in fee subject to a lease for 99 years made by a prior owner, grants and confirms that lease. Subsequent owners in their wills and deeds, used terms adapted to pass the legal estate, granted leases for long terms and exercised other acts of ownership. A reconveyance of the legal fee was presumed. *Noel* v. *Bewley*, 33

2, A contingent remainder-man conveyed his interest to secure a debt; the remainder was afterwards destroyed by the tenant of the prior estate; the remainder-man afterwards acquired a new interest in the property, under the will of that tenant. Held that it was available to the creditor. *Ibid.*

GUARDIAN.

1, The father of illegitimate children has no authority to appoint guardians for them by will. *Mills* v. *Roberts*, 491

2, The court will appoint guardians. *Ibid.*

HEIR AT LAW.

1, A., by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration *cum test. annexo* must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended. *Fordham* v. *Rolfe*, 257

2, Where the heir at law, by reason of his being out of the jurisdiction, is not before the court, the court will merely direct the trusts of the will to be carried into execution; and if the decree be, that the will be established, the heir at law being absent, would not be bound, 258, *n*

3, But it is not a good exception to a report of good title, that the heir at law is not a party, 258, *n*

HEIR AT LAW.

4, The heir at law should be made defendant, and not co-plaintiff, when any deed, will, &c. is to be proved against him. *Ibid.*

5, A constructive trust is not within the statute 6 G. 4. c. 74. enabling infant trustees to convey, 259

6, A. contracted to sell a freehold estate to B., and by his will gave the purchase-money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust, to sell the same, and apply the purchase-money to the like purposes. A. died, leaving a son, his heir-at-law, who died, leaving an only daughter, his heiress-at-law, an infant. The court held, that she was not a trustee within the act 6 G. 4, c. 74. and dismissed a petition that the infant might be ordered to convey. *In the matter of Henrietta Moody, an infant*, 259

7, An heir-at-law, in his answer to a bill to establish a will, admitted that the will was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will, and the sanity of the testator: Held, that the court would not allow him to do so. *Livesey* v. *Harding*, 481

8, The heir-at-law entitled to his costs from the plaintiff; who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator.—*Winter* v. *Hicks*, 490

HERITABLE BOND.

1, A. being entitled to a Scotch heritable bond, devised it with other property.

The heritable bond does not pass, but descends to the heir-at-law.

It is immaterial that there is also a personal objection.

The debt still retains its real character as the jus nobilius. *Jerningham* v. *Herbert*, 305

2, An heritable debt is not changed into moveable by an accessory moveable security, 310, *n*

HUSBAND AND WIFE.

1, The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt: Held, that the bankrupt having survived his wife, the assignees became beneficially entitled. *Harper* v. *Havenhill*, 327

2, On a marriage, the father of the wife purchased 1000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest.

This daughter married J. M., and died in the lifetime of the mother, leaving J. M. her surviving.

J. M. did not take out administration to the effects of his deceased wife, and afterwards died:

Held, that his executors were entitled to the 1000*l.* consols, and that the representatives of the wife were not entitled.

One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the court gave costs against both of them. *Platt* v. *M'Dougall*, 444

3, Land purchased by the husband, subject to a mortgage, with the money of a half sister of the wife, was on her marriage settled on the husband and wife for their

HUSBAND AND WIFE.

lives, and the life of the survivor of them, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the son being dead, the widow also levied a fine: Held, that the property was not within the spirit of the statute of 11 H. 7, c. 20.; and that the plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations of the widow. *Watkins* v. *Lewis*, 475

IMPLICATION.

By a marriage settlement, a portion to which the wife was entitled was assigned, in trust, for her separate use during the coverture, and in case she should die in her husband's lifetime, then in trust for him during his life, and after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, and in default of such issue, in trust for such persons as the wife should by deed or will appoint: the wife survived the husband: held, that she was entitled to the interest of the portion for her life. *Tunstall* v. *Trappes*, 123

INFANT.

1, Order for a reference as to maintenance out of an infant's freehold estate, made upon petition without suit. *Ex parte Starkie*, 143

2, Testator directed the interest of his residue to be paid to his wife, for the maintenance of herself and her children, until the death of her father, when it was to cease, and to be accumulated for the children, (the testator having understood that his wife's father had made ample provision, by his will, for the testator's wife and children) and the testator directed his residue, and the accumulations, to be transferred to his children when the youngest attained 21, with benefit of survivorship on their dying under 21 and without issue, but if having issue, then the issue to take the deceased parent's share with a bequest over in case all the children died under 21, and without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The court refused to allow maintenance out of the residue, to the testator's infant children, although the legatees over consented to the application. *Kime* v. *Welfitt*, 236

INJUNCTION.

*(See copyright.)*

An injunction was prayed for in the prayer of the bill, but was omitted in the prayer of process; and, by reason of that omission, an application for an injunction, made on the merits confessed in the answer, had been refused; but the plaintiff had leave to amend, for the purpose of supplying the omission. The bill was amended accordingly; and, shortly afterwards, the motion was renewed, and it was directed that the application could not be repeated, until the time for answering the amended bill had expired. *Wood* v. *Beadell*, 117

INSOLVENT DEBTORS.

1, A person who had been twice discharged by the court for the relief of insolvent debtors died possessed of considerable property:

Held, that this court could administer the fund: that first the creditors subsequent to the second insolvency should be paid; then those after the first insolvency; and, lastly, those before the first insolvency. *Barton* v. *Tattersall*, 438

INSOLVENT DEBTORS.

2, The statute of limitations does not affect the creditors of an insolvent in respect to the time elapsed since his discharge. *Ibid.*

3, A testator gave a dwelling-house and a piece of land to trustees upon trust, to receive the rents and apply the same for the board, lodging, maintenance, support, and benefit of the testator's son, as they should think proper, for his life; and the application thereof for the benefit of his son, was to be at the entire discretion of the trustees; and the son was not to have the power in any way to sell, mortgage, or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors. The plaintiffs were his assignees:

The court decreed a conveyance to the plaintiffs. Trustees to retain their costs as between solicitor and client. *Green* v. *Spicer*, 448

INSURANCE.

A testator charged his real estate with an annuity to his widow, and subject thereto, devised it to S. A. in fee, and appointed her his executrix. The testator had insured a house. Policy expired a few months after his death, and was then renewed by S. A. Soon afterwards the house which was the whole of his real estate was burnt down. The insurance money was ordered to be paid into court on a motion by the widow, in a suit instituted by her against S. A. for the administration of the testator's estate. *Parry* v. *Ashley*, 33

INTEREST.

1, A judgment creditor is entitled to interest on his debt, where a warrant of attorney authorizes a judgment to be entered up for double the sum actually due, and the judgment is entered up accordingly, interest will be allowed on the debt. *Tunstall* v. *Trappes*, 123

2, Interest at 4 per cent. directed to be computed on advancements made by a father to his children, from the time when the father's property was divisible amongst them. *Andrews* v. *George*, 170

INTERPLEADER.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, can not maintain a bill of interpleader.

But where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants. *Cooper* v. *De Tastet*, 343

ISSUE.

A portioner is not entitled to an issue as a matter of right. *Lewis* v. *Bridgman*, 137

JUDGMENT.

1, Where a judgment is entered up against the owner of lands of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment. *Tunstall* v. *Trappes*, 123

2, A judgment-creditor is entitled to interest on his debt, where the warrant of attorney authorizes the judgment to be entered up for double the amount of the sum actually due. *Ibid.*

3, When an estate is sold under a decree of the court for payment of debts, a judgment-creditor will be entitled to be paid out of the whole produce of the estate, and not out of a moiety only. *Ibid.*

4, Where an estate is settled to the usual uses to bar dower, and then a judgment is entered up against the owner of the estate, and before execution is taken out, the

JUDGMENT.

owner of the estate appoints it to a purchaser, the judgment-creditor's lien is defeated. *Ibid.*

5, Notwithstanding the West Riding Register Act directs that no judgments shall effect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it. *Ibid.*

LANDLORD AND TENANT.

A lessee of a mill and steam engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 194

LEGACY.

1, A legacy to a witness to a will relating to personal estate only is not void, under 25 G. 2, c. 6. *Foster* v. *Banbury*, 20

2, Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining 21; and, in case of the death of either of them before that period, the legacy to be divided amongst the survivors. Held that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them a separate legacy to that amount. *Stewart* v. *Garnett*, 172

3. Testator bequeathed 10,000*l.* to trustees, in trust to pay the interest to his daughter, for life. Provided that, when she married, one moiety of the 10,000*l.* should be paid to her or her husband, and that the other moiety should be held in trust to pay the interest, to his daughter, for life, and, after her decease, in trust for her children, and, if she had no children, then to sink into the residue of his personal estate, which he gave to his two sons. The daughter married during the testator's lifetime, and the testator settled 10,000*l.* in trust for his daughter for life, for her separate use, and, after her decease, in trust for her husband for life, and, after the decease of the survivor, in trust for the children of the marriage as the husband and wife should jointly appoint; and, in default of such joint appointment, then as the survivor should appoint; and, in default of any appointment, then in trust for the issue of the marriage; and, on failure of such issue, then in trust for the issue of the testator living at the death of the survivor of the husband and wife: Held that the provision made by the settlement was a satisfaction of the legacy. *Platt* v. *Platt*, 220

4, In 1752, a testator gave a legacy to a boy on his attaining twenty-one. The legatee went to America at an early age, and had not since been heard of. On a bill by the personal representatives of the boy, the court directed an inquiry, whether he attained the age of twenty-one, and whether he was living or dead, with liberty to report special circumstances. *Hudson* v. *Twining*, 409

LEGACY DUTY.

1, A legacy of 50*l.* a year to be laid out in bread for the poor of a parish, is liable to the legacy-duty: although the poor were so numerous that no one received more than the value of 2*s.* per annum. In re *Francklin's Charity*, 54

2, Testator gave an annuity of 300*l.* free from all taxes and stamp duties, to I. and H. during their joint lives, and to the survivor during her life, and, after the death of the survivor, to G. for her life. By a codicil he revoked the annuity of 300*l.*

LEGACY DUTY.

given to I. and H. and gave them an annuity of 100*l.* each, with benefit of survivorship. The annuities of 100*l.* are subject to the legacy duty. *Burrows* v. *Cottrell*, 161

LIEN.

A. conveys an estate to B., in consideration of B. entering into the covenants contained in the deed, for paying an annuity to A., and 3,000*l.* to certain persons in the event of his, B.'s, marrying. Held that the covenants did not create a lien on the estate. *Clarke* v. *Royle*, 218

LIS PENDENS.

A testator gave lands to A. in strict settlement, and a manor to B. in strict settlement. On his death a creditor's bill was brought for the administration of assets, and it appearing that the testator owed a debt on mortgage, and some specialties, the Master was directed to ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage.

The Master sold the manor and lands. The title to the lands was completed, and the purchase money paid, but no good title could be made to the manor. The report was confirmed in 1798. B. continued in the possession of the manor, and never paid the contribution; and in 1824 he and his eldest son having suffered a recovery, sold it to J. I. F. In 1825 A. died, and in the same year his eldest son, tenant in tail, filed his bill against B., and his eldest son, and the purchaser. Decreed, that this was a purchase *pendente lite;* and the contribution reported by the Master to be paid from the estate devised to B., with interest and costs, was ordered to be raised by sale and mortgage, and paid to the plaintiff. *Kinsman* v. *Kinsman*, 449

MAINTENANCE.

1, Order for a reference as to maintenance out of an infant's freehold estate, made upon petition without suit. *Ex parte Starkie*, 143

2, Testator directed the interest of his residue to be paid to his wife, for the maintenance of herself and her children until the death of her father, when it was to cease, and to be accumulated for the children, (the testator having understood that his wife's father had made ample provision, by his will, for the testator's wife and children), and the testator directed his residue, and the accumulations, to be transferred to his children when the youngest attained 21, with benefit of survivorship on their dying under 21 and without issue, but if having issue then the issue to take the deceased parent's share with a bequest over in case all the children died under 21, and without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The court refused to allow maintenance out of the residue, to the testator's infant children, although the legatees over consented to the application. *Kime* v. *Welfit*, 236 .

3, The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the Master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the court refused to make any reference to the Master with respect to the maintenance of the infants in the time passed, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them. *Simon et ux. and others* v. *Barber and others*, 264

MAINTENANCE.

Bequest of 10,000*l.* provided the legatee attain twenty-one.

In a subsequent part of the will the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated:

Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent.

The legatee being a natural child, the testator had no power to appoint guardians for her, but the persons named in the will being well known to the court as proper persons, they were appointed guardians without a reference to the Master. *Mills* v. *Robarts*, 491

MARRIAGE.

1, A marriage to the sister of a deceased wife is voidable, and if not made void during her life, it can not be made void afterwards, 444

2, The court will direct an inquiry as to a marriage in Scotland. *Ibid.*

MARSHALLING.

Husband and wife being lessees of a rectory, assign it to trustees, in trust to sell and pay certain bonds of the husband and mortgages on his freehold estates: and by deed of even date, the husband in consideration of his wife having joined in the assignment, conveys his freehold estates in trust for himself and his wife for their lives, and, after their deaths to be sold for the benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds and mortgages: Held that the bond-creditors had no right, as against the children, to throw the mortgages upon the produce of the freeholds. *Boazman* v. *Johnston*, 162

MORTGAGE.

1, Inadequate consideration is no ground for relief in equity in respect to the sale to the mortgagee of the property in mortgage, although the mortgagor be in distress, if no advantage be taken of it, 270

2, Devise of lands, subject to 1000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon. *Phillips* v. *Parker*, 328

3, T. H., by his will, devised certain freehold and leasehold property to a trustee, upon trust, to permit his son, T. E. H., to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same; remainder upon trust for the sons of T. E. H. in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2000*l.* subsequent to the bankruptcy for rents: Held, that these rents were liable to the fines for renewal. *Hulkes* v. *Barrow*, 384

4, Twenty years are not absolute bar to a mortgagee. It is merely a case of presumption, which may be rebutted. A supplemental bill can not be filed to an original bill in respect of which subpœnas have not been served. *Stewart* v. *Nicholls*, 405

5, A mortgage was made in 1790, and the mortgagor became bankrupt in 1794; there were several prior mortgages. The court would not in 1829 presume this debt satisfied. *Ibid.*

6, The court will not give relief, if there has been an adverse possession for twenty years. *Ibid.*

MORTGAGE.

7, An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook when thereunto required, to execute a transfer of the same:

Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein. *Palmer* v. *Scott*, 497

MORTMAIN.

Gift by will to a charity of money due on a covenant to sell a freehold house, is within the statute of mortmain, and void, 389, 390

MULTIFARIOUSNESS.

Where under a will the residuary legatees are also appointees of a share of another testator's estate, a bill filed by them, for an account of both estates, is multifarious. *Marcor* v. *Pebrer*, 202

NOTICE.

1, Where a judgment is entered up against the owner of lands of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment. *Tunstall* v. *Trappes*, 123

2, Notice to a solicitor is actual notice to the client. *Ibid.*

3, Notice to the agent is notice to the principal, but then it must be in the character of agent, 345

4, A suit pending is notice to a purchaser, 399

PARTIES.

1, The dean and chapter of C. being rectors of a parish, leased all the tithes belonging to the rectory: the lessees filed a bill for tithe of hops, against the occupiers, to which the vicar was made a party as claiming that tithe. The occupiers then file a cross bill against the dean and chapter and their lessees, for a discovery and production of documents: Demurrer by the dean and chapter, allowed.—*Tooth* v. *The Dean and Chapter of Canterbury*, 25

2, In general, a landlord can not be made a defendant to a bill, for tithes, against his tenants. But if he is charged with having got into his possession, from his tenants and other persons, documents, for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, the landlord can not demur to the bill. *Day* v. *Drake*, 25

3, A., by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration *cum test. annexo* must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended. *Fordham* v. *Rolfe*, 257

4, A testator had by his will, in 1752, given legacies to several persons on their attaining twenty-one. One of them went to America when a boy, and had not since been heard of. His legacy had been handed over many years since, to the defendants, who had, by accumulations of interest, now made it amount to sixfold; and this bill was, by his personal representatives, for payment thereof to them. It was suggested that the representatives of the original testator ought

PARTIES.

to have been parties, but the court did not think they were necessary parties.—*Hudson* v. *Twining*, 409

5, A party having purchased land, and signified at the time, that he made the purchase on behalf of the trustee in his marriage-settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the cause to proceed until the trustee were made a party; and the cause stood over for that purpose. *Wynniat* v. *Lindo*, 510

PARTITION.

1, A testator devised his moiety of an estate, and then made partition with his co-tenant; on this, the estate was conveyed to a trustee as to one part of the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance: Held, that this is not a revocation of the will. *Barton and others* v. *Croxall and others*, 338

2, A mere partition does not revoke a will, 342

PARTNERSHIP.

1, Mines are, for many purposes, partnership property. They are liable to the debts of the partnership, and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share re-payment is to be made to the co-partnership of what is due to it from him.—*Fereday* v. *Wightwick*, 377

2, A commission was issued against two partners, subsequently a commission was issued against one of them and three other persons: this latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance. *Burlton* v. *Wall*, 311

3, It is a principle that all property, whether real or personal, is subject to a sale on a dissolution of the partnership, 383

4, Property acquired by the partnership for the purposes of the concern is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership. *Ibid.*

5, Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment.

If the debtor permits one of such partners to receive moneys in the confidence that those moneys will be a satisfaction of the partnership debt, the retainer of those moneys is equivalent to an actual payment. *Pritchard* v. *Draper*, 414

6, The plaintiff and defendant held some powder-mills on a lease, which would expire in 1831. The plaintiff filed his bill for a dissolution of the partnership; it was objected by the defendant that the partnership must last during the lease, but the court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant. *Alcock* v. *Taylor*, 507

PAUPER.

Pauper plaintiffs who had been guilty of vexatious conduct in the suit, ordered to be dispaupered. *Wagner* v. *Mears*, 45

PERSONAL ESTATE.

2, A. having power to appoint 700*l.* which was to be raised under the trusts of a term,

PERSONAL ESTATE.

by her will, appointed that sum, to the persons whom she made her executors, *in trust;* but she did not declare, expressly, any trust of that sum. She then bequeathed her personal estate to the same persons, in trust, and subject to the payment of her debts and legacies. Held, in suit instituted by the legatees, that the 700*l.* ought to be raised, and applied in the same manner as the testatrix's personal estate. *Goodere* v. *Lloyd*, 238

PERSONAL REPRESENTATIVES.

Those words mean, executors and administrators. *Saberton* v. *Skeels*, 441

PLEADING.

1, Bill to have acceptances fraudulently obtained from the plaintiff, by one of the defendants, and which were in possession of the other defendant, but who claimed no interest in them, delivered up to be cancelled. The former defendant pleaded his bankruptcy under a commission issued after the filing of the bill. Plea overruled. *Mackworth* v. *Marshall*, 157

2, To a bill filed by persons claiming title to an estate, as the co-heirs of A. *ex parte maternâ*, the defendants pleaded that another person was the heir of A. *ex parte maternâ*, but did not set forth the pedigree of that person: *semble* that such a plea is good. *Emerson* v. *Harland*, 214

POLICY OF ASSURANCE.

A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B.'s executors then sold and assigned the policy to D. for nominal consideration, and then D.'s executors sell it to E. Held, that they could make a good title to the policy, and that E. was bound to complete his purchase. *Ashley* v. *Ashley*, 55

PORTIONS.

5, By a marriage settlement a term was created for raising portions for daughters, in case the father should die without issue male, such portions to be paid at 21 or marriage, but if the daughters should attain that age, or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained 21 and married, and afterwards died in her father's lifetime: the father died without issue male: Held, nevertheless, that the daughter's representatives were entitled to her portion. *Fry* v. *Lord Sherborne*, 102

POWER.

1, A married woman having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gives to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease: held not to be an execution of the power. *Lovell* v. *Knight*, 118

2, Where an estate is settled to the usual uses to bar dower, and then a judgment is entered up against the owner of the estate, and before execution is taken out, the owner of the estate appoints it to a purchaser, the judgment creditor's lien is defeated, 125

3, By a marriage settlement, a fund was vested in trustees, in trust for all and every the child and children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions and limitations, as the wife,

POWER.

in case she survived her husband, should appoint. There was one child only of the marriage. The wife appointed the fund to that child, for her separate use, for life, and, after her decease, to such persons as the child should appoint, and, in default of such appointment, to the executors or administrators of the child. Held that the power in the settlement was well exercised. *Bray* v. *Hamersley*, 226

4, Sir H. E. by his will, devised his lands to trustees, to the use of his eldest son for life, sans waste, and in strict settlement, with remainders over, under which the defendant ultimately became tenant in tail in possession; and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed, exclusive of the timber, which was to be valued, and the amount of the valuation paid to the tenant for life. By the conveyances, the surviving trustee, in consideration of the price fixed, conveyed the land to the purchaser: and the tenant for life, in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser:

Held, that this was a bad execution of the power in a court of equity.

The plaintiff having endeavoured to show that there was in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the court to aid the execution of the power, but the court being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intentions of the parties, refused to aid the execution of the power. *Cockerell* v. *Cholmeley*, 468

5, A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would *give and bequeath* the same to her children by him, as she should appoint. The widow, by will, made an appointment to five of her seven daughters:

Held, that the appointment was void, all the children being entitled to the benefit of the fund:

Held, that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not take any part of the fund.—*Walsh* v. *Wallinger*, 464

6, Powers generally require certain formalities in the mode of execution; and, if there be a valuable consideration, the court will aid the defective execution of a power, 467

7, Where a person has a general power of appointment, and he duly executes it, but the court subsequently deprives the appointee of the benefit of it, on the ground of fraud upon the appointor, yet the court will not declare the appointment void in favour of the persons entitled in remainder, in default of appointment, but will decree that the appointee is a trustee for the personal representatives of the appointor. *Mellor* v. *Minet*, 493

PRACTICE.

1, On 19th April 1828, plaintiff obtained an order to withdraw replication and amend and amended accordingly. In 1829, he obtained, as of course, another order to amend. Motion to discharge the second order refused, the first having been made before the new orders came into operation. *Leith* v. *Wildman*, 33

2, In general, a motion to amend a second time after answer, can not be made without notice. *Freame* v. *Best*, 56

3, In what cases notice of a motion to amend a second time is not necessary. *Ibid.*

PRACTICE.

4, An injunction was prayed for in the prayer of the bill, but was omitted in the prayer of process, and, on that account, a motion for an injunction was refused: but leave was given to amend. The bill was accordingly amended, and on the motion being renewed, it was objected that the application could not be repeated, until the time for answering the amended bill had expired; but the objection was overruled. *Wood* v. *Beadell*, 117

5, Defendant moved to dismiss the bill for want of prosecution. Plaintiff undertook to speed. There was time sufficient to file a replication on the same day: but none was filed till the next day: held that the defendant was entitled to draw up the order of dismissal. *Allen* v. *Willes*, 117

6, Leave given, before publication, to examine a witness (who had been examined and cross-examined) as to circumstances brought to his recollection, after his examination in chief. *Cockerell* v. *Cholmeley*, 136

7, A defendant who had taken out three orders for time to answer, and then pleaded, refused further time, on the plea being overruled. *Mackworth* v. *Marshall*, 157

8, A defendant against whom a *subpœna* is prayed, on his coming within the jurisdiction, is not, in substance, a party to the suit; and therefore the bill can not be amended after the expiration of six weeks from the time when the last of the answers of the defendants, who are within the jurisdiction, is to be deemed sufficient, though the other defendant may not have answered. *The King of Spain* v. *Hullett*, 143

9, Order for a reference as to maintenance out of an infant's freehold estate, made upon petition without suit. *Ex parte Starkie*, 143

10, Last answer filed 30th November 1829. On the 17th February 1830, defendant gave notice to dismiss. Two days afterwards, plaintiff obtained order to amend. Motion to dismiss granted. *Swinfen* v. *Swinfen*, 165

11, The amendment of a bill under leave given on the allowance of a demurrer, is not reckoned for the purposes of the 13th order. *Pesheller* v. *Hammett*, 168

12, If, upon a question of title, the Master is satisfied with the evidence produced before him, but upon the hearing of an exception to the report, the court thinks the evidence not sufficient, the court upon the application of the vendor will refer it back to the Master to review his report in order to give the vendor an opportunity of producing further evidence. *Andrew* v. *Andrew*, 168

13, Upon the allowance of exceptions to a report approving of a title, the court will, on the application of the vendor, refer it back to the Master to review his report in order to give the vendor an opportunity of producing evidence to remove the objection. *Egerton* v. *Jones*, 169

14, Motion by a defendant, before answer, to examine a witness *de bene esse*, granted. *Brown* v. *Child*, 197

15, The defendants had brought an action against the plaintiffs to recover a sum alleged to be due for town dues. The plaintiffs filed their bill, alleging that the defendants had in their custody cases for the opinion of counsel, by which it would appear that the defendants had no right to levy the dues, and also various charters, deeds, &c. by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody, several cases, two of which were prepared many years ago, and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared pending, or in contemplation of the existing proceedings, and that they also had, in their custody, charters, deeds and copies of accounts from public offices, which evidenced their title to the dues. A motion, by the plaintiffs, for a production of all the

PRACTICE.

documents, was granted as to the two old cases only. *Bolton* v. *The Corporation of Liverpool*, 202

16, A plaintiff having, by mistake, omitted to file a replication before he examined his witnesses, leave was given to him, notwithstanding publication passed, to re-examine his witnesses on the interrogatories already filed, but not to examine any new witnesses. *Healey* v. *Jagger*, 216

17, If a plaintiff reads a passage in an answer, which does not refer to, but is qualified by, a subsequent passage, the defendant may read the latter passage. *Rude* v. *Whitchurch*, 251

18, Although a decree direct that all accounts be taken, the Master will not take the accounts of a partnership, unless especially directed so to do. *Wooley* v. *Gordon*, 259

19, But the court will direct an inquiry, whether there was a partnership, and if the fact be found in the affirmative that the accounts be taken, 260

20, And the court will direct this on the petition of a party after the usual decree has been made, under special circumstances. *Ibid.*

21, The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the Master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the court refused to make any reference to the Master with respect to the maintenance of the infants in the time passed, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them. *Simon et ux. and others* v. *Barber and others*, 264

22, But except in the case of a father, the court will direct past and future maintenance. *Mills* v. *Robarts*, 491

23, The court refused to allow a petition to be amended by substituting another person for the petitioners, who, on the hearing of the petition, appeared to have no title. *St. John* v. *Stirling*, 265

24, When there is a doubt about the identity of a legatee, the court will direct an inquiry at the expense of the person requiring it. *Denyer* v. *Druce*, 271

25, A bill having been filed by the plaintiffs on behalf of himself and the others of the crew of a *South Sea* whaler, for their shares of the profits, and *no case* for equitable relief having been made as to *the others* of the crew, the bill, as to them, to be dismissed. *Spittal* v. *Smith*, 275

26, Two ladies borrowed 10,000*l.* of Coutts and Co. on the bond of themselves and G. N.; they gave a bond for 12,000*l.*, at the same date, to G. N. A question having arisen, whether the bond was for indemnity, or a gift for services, or otherwise, the court directed issues to be tried before a jury. *Earl of Winchelsea* v. *Garretty*, 285

27, The court will, on the petition of an assignee of the reversion, order the accountant-general not to transfer stock, although the petition has not been served on the assignor. *Salmon's case*, 291

28, The Master of the Rolls has no authority to reverse the Vice Chancellor's order to supersede a commission of bankrupt, or to re-hear the order. *Burton* v. *Wall*, 311

29, The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to. *Topham* v. *Constantine*, 322

30, Accounts having been settled, and a release executed, in order to avoid the latter, and obtain an account in this court, the plaintiff must establish either fraud or surprise.

PRACTICE.

One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor, he is not liable for moneys which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over. *Davis* v. *Spurling*, 349

In order to induce the court to give a decree to surcharge and falsify, some *one* mistake must be shown. *Ibid.*

If an error is detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify. *Ibid.*

Bill seeking relief on the ground of fraud or surprise—plaintiff failing to establish either, is dismissed with costs. *Ibid.*

31, The parties choose to satisfy themselves with a personal obligation, the court on a bill for specific performance will not give more. *Brough* v. *Oddy*, 360

32, Where a plaintiff shows a title to some land and a confusion of boundaries, he is entitled to a commission or an issue. In this case a commission was directed. *Godfrey* v. *Littell*, 360

33, It is not the practice for executors to apply to pay money into court. *Lord Dorchester* v. *Effingham*, 390

34, A supplemental bill can not be filed to an original bill in respect of which subpœnas have not been served. *Stewart* v. *Nicholls*, 405

35, A purchaser in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase money into court for the benefit of the parties to the suit. *Hodder* v. *Ruffin*, 419

36, The court will not at the hearing dismiss a subsequent incumbrancer, although he undertook to join in any conveyance he might be called upon to execute. He ought to have disclaimed on his answer, and not having done so, must remain a party. *M'Nab* v. *Mensall*, 436

37, The eighth of Lord Lyndhurst's orders applies only to the answer to exceptions. *Fosbrooke* v. *Balguy*, 468

38, An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it. *Winter* v. *Hicks*, 490

39, Executors having duly filed their bill in a case of fraud, although they had not properly stated their prayer, yet under their prayer for general relief, they were held to be entitled to such relief as the case made by the bill required, 496

PRINCIPAL AND AGENT.

The plaintiff was a holder of 20,000 French rentes. The defendant resided in London, and dealt largely in foreign securities, and had contracted for the Prussian loan: he was also a partner with his brothers, who were bankers in Paris. The plaintiff employed the defendant to sell his rentes: the defendant, without the plaintiff's knowledge, purchased them for himself and his partners, but gave the plaintiff the market price. The plaintiff then purchased Prussian bonds of the defendant, and agreed that they should remain in his hands as a security for the purchase-money, which remained unpaid: but no bonds were appropriated for the plaintiff. The defendant, however, had always in his hands bonds to a greater amount. The plaintiff afterwards directed the defendant to sell the bonds, and the defendant subsequently informed the plaintiff that he had sold them accordingly; and he gave the plaintiff credit for the alleged price. The plaintiff then purchased 115.000 rentes of the defendant, which he was to pay

PRINCIPAL AND AGENT.

for on a future day, and the rentes were then to be transferred to him: but no rentes were set apart for the plaintiff, or identified as belonging to him. Before the day of payment arrived, the defendant, by the plaintiff's desire, sent an order to his partners to sell the rentes, and they subsequently informed the plaintiff that they had sold them accordingly, and gave the plaintiff credit for the alleged proceeds. The accounts between the plaintiff and defendant were afterwards settled, and the plaintiff paid the balance which appeared due from him to the defendant. Four years afterwards the plaintiff, having discovered that the 20,000 rentes had been purchased by the defendant and his partners, and that there was no appropriation on the two other purchases, filed his bill to have all the transactions set aside, and the court decreed accordingly. *Brookfield* v. *Rothschild*, 57

PRODUCTION OF DOCUMENTS.

1, The court will not order a defendant to produce letters, which passed between him and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice. *Garland* v. *Scott*, 171

2, The defendants had brought an action against the plaintiffs to recover a sum alleged to be due for town dues. The plaintiffs filed their bill, alleging that the defendants had in their custody cases for the opinion of counsel, by which it would appear that the defendants had no right to levy the dues, and also various charters, deeds, &c. by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody, several cases, two of which were prepared many years ago, and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared pending, or in contemplation of the existing proceedings, and that they also had, in their custody, charters, deeds and copies of accounts from public offices, which evidenced their title to the dues. A motion, by the plaintiffs, for a production of all the documents, was granted as to the two old cases only. *Bolton* v. *The Corporation of Liverpool*, 202

PURCHASER.

Where a judgment is entered up against the owner of lands of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment. *Tunstall* v. *Trappes*, 123

REMOTENESS.

1, Bequest to J. A. for life, remainder to his eldest son, for life, and to remain entailed on the eldest son of J. A. and his posterity for ever. But in case of the death or want of issue of J. A. to M. (a brother of J. A.) and his descendants as above mentioned from one generation to another for ever. J. A. survived the testator and died a bachelor: Held that the bequest over to M. and his descendants was void for remoteness. *Monkhouse* v. *Monkhouse*, 41

2, An estate at C. was settled on A. for life, remainder to his first and other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, &c., in case of failure of issue of my body by my said wife, I give and devise the same," &c. He then limited the estate to his

REMOTENESS.

brothers in succession, and to their respective first and other sons in tail male. The court was of opinion that the devise was good. *Egerton* v. *Jones*, 179

RESIDUE.

The court will construe a residuary gift more favourably than a general legacy to make it best in order to avoid an intestacy *(Semble)*, 431, 432

REVERSIONS.

1, A person having a reversionary interest expectant upon the death of R. *without issue*, sells the same. Many years after, a bill is filed to set aside the sale, on the ground of inadequacy of consideration:

Held, that the court will not enter into the value of property on such a contingency. But it appearing that the treaty was entered into on a basis of considering the contingency to be half the value of the reversion, the court directed an inquiry of the real value without reference to the contingency, and directed that that contingency should be rated at one half the value. *Baker* v. *Bent*, 432

2, It is incumbent on the purchaser of a reversion to prove the value, 436

A bill filed in 1826, to make void a sale of a reversion made in 1805; it was proved that the price was inadequate. It was held, that in a suit to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient, by the decided cases, to authorize the court to make void the sale and treat the purchaser of a reversion only as a mortgagee: that is, that the vendor, paying the purchaser his principal, interest, and costs, is entitled to a reconveyance. *Hilliard* v. *Gambel*, 437

SATISFACTION.

Testator bequeathed 10,000*l.* to trustees, in trust to pay the interest to his daughter, for life. Provided that, when she married, one moiety of the 10,000*l.* should be paid to her or her husband, and that the other moiety should be held in trust to pay the interest, to his daughter, for life, and, after her decease, in trust for her children, and, if she had no children, then to sink into the residue of his personal estate, which he gave to his two sons. The daughter married during the testator's lifetime, and the testator settled 10,000*l.* in trust for his daughter for life, for her separate use, and, after her decease, in trust for her husband for life, and, after the decease of the survivor, in trust for the children of the marriage as the husband and wife should jointly appoint; and, in default of such joint appointment, then as the survivor should appoint; and, in default of any appointment, then in trust for the issue of the marriage; and, on failure of such issue, then in trust for the issue of the testator living at the death of the survivor of the husband and wife: Held that the provision made by the settlement was a satisfaction of the legacy. *Platt* v. *Platt*, 220

SECONDARY EVIDENCE.

A claim under a lost deed allowed on the production of an unauthenticated copy of it, coupled with its being recited and recognized in other deeds and instruments, and its being memorialized in the register for the west riding of Yorkshire, where the lands alleged to be comprised in the lost deed, were situate, and the long acquiescence of parties interested in disputing the claim. *Tunstall* v. *Trappes*, 123

SOLICITOR AND CLIENT.

The court will not order a defendant to produce letters, which passed between him and his solicitor, in the relation of solicitor and client, in the progress of the

SOLICITOR AND CLIENT.

cause, or with reference to it, previously to its being instituted, or which contain legal advice. *Garland* v. *Scott*, 171

SPECIFIC PERFORMANCE.

1, A husband being prosecuted and found guilty at the quarter sessions, of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*, and the court, adverting to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court, that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions that to some extent supported it:

Held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to an agreement entered into by his counsel, but on the defendant to disprove it.

Held, also, that the weight of the evidence being that the defendant did not dissent, a court will conclude a counsel had authority.

Held, that the plaintiffs were entitled to a decree for a specific performance, with costs. *Elworthy* v. *Bird*, 271

2, A. agrees to lend B. 3000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l.* in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l.* and interest:

Held that he was not entitled to the title, but only a specific performance of the contract, as proved; and that the plaintiff, not obtaining the decree he asked, shall pay the costs. *Bass* v. *Clivley*, 292

3, The plaintiff having parted with title-deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor.

On a bill for specific performance and adequate security:

The annuity fell into arrear, and the plaintiff paid it.

Held, that, the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed. *Brough* v. *Oddy*, 357

4, An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night testator died.

The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other family. *Beastall* v. *Swain*, 395

STAMPS.

Letters of administration under which a plaintiff makes title, must be stamped *ad valorem;* but the court will allow a cause to stand over for a week for that purpose. *Harper* v. *Ravenhill,* 144

TERRIER.

A terrier, though signed by churchwardens only, is admissible evidence in a suit for tithes, by a portioner against an occupier. *Lewis* v. *Bridgman,* 316

TITHES.

1, In general, a landlord can not be made a defendant to a bill, for tithes, against his tenants. But if he is charged with having got into his possession, from his tenants and other persons, documents, for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, the landlord can not demur to the bill. *Day* v. *Drake,* 25

2, Whether a court of equity can make a decree to establish the right to tithes. *(Quære.) Ibid.*

3, A portioner entitled to tithe-hay is not necessarily entitled to tithe of clover, tares, vetches, and grass cut and carried away green *(semble).* *Lewis* v. *Bridgman,* 137

4, Wood cut from hedges is titheable, although used on the farm. *White* v. *Smith,* 405

TITLE.

1, If, upon a question of title, the master is satisfied with the evidence produced before him, but upon the hearing of an exception to the report, the court thinks the evidence not sufficient, the court upon the application of the vendor will refer it back to the master to review his report in order to give the vendor an opportunity of producing further evidence. *Andrew* v. *Andrew,* 168

2, Upon the allowance of exceptions to a report approving of a title, the court will, on the application of the vendor, refer it back to the master to review his report in order to give the vendor an opportunity of producing evidence to remove the objection. *Egerton* v. *Jones,* 169

TRUSTEE.

1. A. having contracted for the purchase of an estate, agrees by deed, to convey it to two partners to whom he was indebted, upon trust to sell, and after paying prior charges, to retain their own debt; and it was provided that the power of sale might be exercised, by the partners, before any conveyance should be made to them. No conveyance was ever made or required to be made to the partners, nor did they attempt to exercise the power of sale, and one of them having died; the survivor agrees with an agent of A. to purchase the estate: Held that he was not a trustee; but stood in the situation of a creditor, with a security for his debt, and therefore was not disqualified from purchasing the estate. *Chambers* v. *Waters,* 21

2, A. contracted to sell a freehold estate to B., and by his will gave the purchase money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust, to sell the same, and apply the purchase-money to the like purposes. A. died, leaving a son, his heir at law, who died, leaving an only daughter his heiress at law, an infant. The court held, that she was not a trustee within the act 6 G. 4, c. 74. and dismissed a petition that the infant might be ordered to convey. *In re Moody,* 259

3, Where a sole trustee in a will, to whom a term of 2000 years was devised, dies in

TRUSTEE.

the testator's lifetime, the court will refer it to the master to appoint a new trustee, and to settle and approve of a demise for the like term. *Devey* v. *Peace*, 291

4, Only one trustee having been appointed by the will, the master can only have to name *one*, 292

5, Trustees not affected by notice to their agent, which he did not receive in that character.

Trustees, having contracted to purchase land, sell out stock, and deposite the produce at a banker's when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail. *France* v. *Wood*, 343

6, The master of the rolls, in a suit by the assignees of a bankrupt against a trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favour of the plaintiffs, would not make the trustee pay costs, he having acted in ignorance.—*Knight* v. *Martin*, 370

7, In a suit for the appointment of new trustees, there being no power in the deed for that purpose, the court refused to direct such a power to be inserted in the new deed. *Southwell* v. *Ward*, 409

8, The testator having directed his two trustees to apply a moiety of rents or such part as they or he should in their or his discretion see fit in the maintenance and education or advancement in life of his younger children during the life of his wife; and one of the trustees having died, the court would not interfere with the discretion to be exercised by the surviving trustee. *Livesey* v. *Harding*, 489

9, Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent: Decree, that the other trustees account for and pay the amount. *Marriott* v. *Kinnersley*, 487

10, A trustee is liable, if he incautiously does an act by which he places the trust property in the hands of persons who abuse it. *Ibid.*

11, A trustee is not chargeable for acts done before he accepts or acts in the trusts.—*Ibid.*

12, If there be a communication between a trustee, and a person for whose benefit a trust is created, then the trustee is liable to him; but he is only not so when there is not that communication. *Ibid.*

TRUSTEE AND CESTUI QUE TRUST.

On a marriage a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to charge securities with consent of the wife. The dividends on the stock being reduced, one of the trustees in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied: the trustee sold the stock and absconded. Held that the co-trustees were liable. *Hanbury* v. *Kirkland*, 113

USURY.

Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious. *Fereday* v. *Wightwick*, 377

VENDOR AND PURCHASER.

1, A purchaser who has contracted for the entirety of an estate, will not be compelled

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to take six undivided seventh parts of it. *See* 1 *Russ. & Mylne*, 296. *Dalby* v. *Pullen*, 14

2, On a sale under a decree, the abstract stated that the vendor was devisee of A., who took as heir to B., and on inquiry, the vendor's solicitor confirmed that statement: the master accordingly approved of the title. Just before the conveyance was executed, the purchaser discovered that C. was the heir of B., and it appeared that the vendor's solicitor had received information of that fact, but concealed it. A motion, by the purchaser, to be discharged from his purchase, was granted, though the vendor had obtained a release from C. before the motion was made. *Ibid.*

3, Upon the allowance of exceptions to a report approving of a title, the court will on the application of the vendor, refer it back to the *Master* to review his report, in order to give the vendor an opportunity of producing evidence to remove the objection. *Andrew* v. *Andrew*, 168, *Egerton* v. *Jones*, 169

4, An estate sold under a decree, was described as of a certain annual value: and, by the conditions, compensation was to be made for any error in the particular. The purchaser paid his money into court, was let into possession, and took a conveyance. After he got into possession, he discovered that the rent was overstated in the particular: Held that he was entitled to a compensation out of his purchase-money. *Cann* v. *Cann*, 192

5, A vendor, who has taken, as a security for part of the purchase-money, the bond of the vendees and a mortgage of part of the property sold, can not, on the bankruptcy of the vendees, establish a lien on the entire estate. *Capper* v. *Spottiswoode*, 264

6, A. having deposited leases with B. to secure moneys borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration.

On a bill to redeem, and that the agreement should stand only as a security: Held, that the plaintiff was not entitled to relief in equity, and bill dismissed. *Purdie* v. *Millett*, 268

7. A purchaser in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser under the court, and must pay the additional purchase money into court for the benefit of the parties to the suit. *Hodder* v. *Ruffin*, 419

8, An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that in fact a good title could be made, and thereupon petitioned the court that the order might be discharged. The court discharged the order, giving the purchaser his costs, and referred it to the Master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry. *Butter* v. *Ommanney*, 419

9, A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for specific performance more than twelve months after that notice, the court held, that it was an unwarrantable delay, and dismissed the bill with costs. *Watson* v. *Reed*, 440

10, The plaintiff made a mortgage to the first husband of the female defendant, who after that husband's death lent the plaintiff the sum of 200*l.*; subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the plaintiff, and signed an agreement indorsed on the lease, that the plaintiff

VENDOR AND PURCHASER.

might re-purchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances not until distresses were levied: Held, that this was not a case of forfeiture, but of particular indulgence; from all the evidence the court was of opinion that the transactions were not contemporaneous, and the court held, that the terms not having been fulfilled, the bill must be dismissed, and with costs. *Davies* v. *Thomas*, 459

11, A purchaser entitled to title deeds having paid his purchase-money into court, the court will not order the money to be divided, and the deeds to remain in the hands of the Master until the completion of the sale of another lot. *Hobson* v. *Neale*, 474

12, Houses and lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed the plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The defendant became the purchaser of four of them, and just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir at law of the surviving trustee. The plaintiffs thereupon presented a petition to the court under the statute of 6 G. 4, that the infant might be directed to convey. The plaintiffs apprised the defendant of this proceeding, to which he made no objection. Twelve months elapsed before the master's report could be obtained, and a short time previously the defendant commenced his action for the deposite, and subsequently recovered it; in the mean time the dilapidations of the houses purchased had increased.

Held, that although the defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the master's office, the plaintiffs were entitled to a decree for specific performance:

Held, that the defendant was entitled to the amount of the dilapidations:

Held, that the defendant was entitled to costs:

Held, that the plaintiffs were only entitled to interest from the date of the decree, but that they were entitled to the rents up to that date. *Hoggart* v. *Scott*, 504

The defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it, was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses: Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs. *Besant* v. *Richards*, 509

VOLUNTARY CONVEYANCE.

1, A conveyance by a debtor, to trustees for payment of scheduled creditors, who do not execute the deed, or conform to its terms, can not be enforced by the creditors. *Garrard* v. *Lord Lauderdale*, 1

2, A father conveys his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee. The annuities were mentioned in a schedule, but the annuitants were not parties to the deed. The father and son then executed other deeds, varying the former trusts: Motion by one of the scheduled creditors, to restrain the trustees from executing

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the trusts of the subsequent deeds, until they had performed the trusts of the first, refused. *Walwyn* v. *Coutts*, 7

WEST INDIA ESTATE.
A testator, resident in Jamaica, devised the rents, issues and profits of his estate, called Islington and Cove's Pen, in that island, to A. B. Held, that the estate and the slaves, mules, cattle and machinery thereon passed under this devise.—*Stewart* v. *Garnett*, 398

WIDOW OF A FREEMAN OF LONDON.
A bequest to the widow of testator in lieu of dower, does not preclude her from her claim on the personal estate as the widow of a freeman of London. *Harrison* v. *Harrison*, 387

WILL.
1, A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written: Reference directed to ascertain what was meant, the master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechey*, 12

2, A testator, after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1200*l.* a year during her life, and also my furniture and house, and after her decease, to S. S. and his heirs. Held, that S. S. was entitled to the fund for payment of the annuity, as well as to the house and furniture. *Oldman* v. *Slater*, 25

3, A testator, resident in Jamaica, devised the rents, issues and profits of his estate, called Islington and Cove's Pen, in that island, to A. B. Held that the estate and the slaves, mules, cattle and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 172

4, Devise of "one moiety of the rents, issues and profits of my estate, named I., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues and profits of my said estate I give to R. and his heirs." Held that the grandchildren take the fee as tenants in common, in a moiety of the estate. *Ibid.*

5, A testator, having one nephew and one niece, and eight great-nephews and neices living at his death, gave one tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children, at 21; and he empowered his trustees to apply all or any part of their respective shares, for their advancement. Held that all the great-nephews and nieces born before the eldest attained 21, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 183

6, Testator gave the yearly sum of 2,000*l.* sterling, to his wife for her life, and, after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.* He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, and, after her decease, for her children. The trustees invested 100,000*l.* five per cents., to answer the two yearly sums. The stock was afterwards converted into four per cents., whereby the dividends became insufficient to pay the yearly sums. Held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. *Kendall* v. *Russell*, 187

7, Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable

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to them at 21, and those of the girls at 21 or marriage, and to accumulate for them in the mean time, with benefit of accruer and survivorship: and, in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid. Held that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained 21 or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 215

8, Testator bequeathed his residuary estate to trustees, in trust to pay the income of one third part to his daughter Sarah, for life, and, upon her death, to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining 25; but in case his daughter should leave but one child her surviving, then the whole of the one third part to go to such only child, on his attaining 25, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain 25, then over: Held that the children were not intended to take vested interest until they attained 25, and that, therefore, the bequest to them was void for remoteness. *Judd* v. *Judd*, 232

9, A testatrix directed her residuary estate to be divided into three equal shares, and gave one share to the children of I. M.; one share to the children of W. H. (subtracting from their share the 2,000*l.* that W. H. owed to the testatrix), and the remaining third part to the children of R. H. Held that the 2,000*l.* was to be considered as part of the residue; that the residue was to be divided into three equal parts, and that the 2,000*l.* was to be taken as part of the share of the children of W. H. *Murray* v. *Samson*, 237

10, A. by each of two several codicils to his will, directed his just debts to be paid, and, in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other he gave 200*l.* to the same charity: Held that the legacies were not accumulative, and that the latter legacy was only a substitution of the former. The gifts in the case were to the *Guernsey* Hospital; there was not any hospital by that name, and therefore, the court would not apply the funds. *Simon* v. *Barber*, 260

11, A. a married woman, having, by virtue of her marriage-settlement, power to appoint her personality and a freehold to such person as she should direct, with remainder to a trustee to sell, and distribute amongst her next of kin, gave, devised, and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and all she might die possessed of at the time of her death, after certain previous bequests and her just debts were discharged, and appointed him and another executors: Held, that the husband took only an estate for life, and that the next of kin were entitled to the moneys to arise by a sale of the reversion. *Monk* v. *Mawdsley*, 266

12, A testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says: "As the whole of this estate is to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct, that their shares may be so settled on themselves during their lives, and on their children, in equal proportions, after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds:—"Should it be the will of Almighty

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God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; and in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families: upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parents would have had.

Held, that the boy, on attaining twenty-one, took an absolute interest in his share.

Held, that the daughters took for life, with remainder to their issue.

Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares. *Jackson* v. *Forbes*, 297

13, J. L., by his will, devised his manors to trustees upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees to preserve contingent remainders; with remainder to the *second* and other younger sons of J. H. L. in tail male.

There was no limitation to the first son of J. H. L., but the declaration of the trust of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then J. H. L. might raise money for the portion of younger sons or daughters:

Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father. *Langston* v. *Pole*, 314

14, R. N. by his will, gave all his personal estate to R. F. and J. N., that is to say, (he then enumerates several particulars,) in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, until the legacies, debts, and charges thereinafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children; and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son.

Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas* v. *Nicholas*, 385

15, Bequest of a sum of 50*l.* to each of the three children of A. Now A. had five children: Held, that each child was entitled to 50*l.* *Harrison* v. *Harrison*, 387

16, An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night testator died.

The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall* v. *Swain*, 395

17, A testator having directed his executors to pay the interest of his residue to a

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woman during her life, and after her decease to divide the residue amongst the next of kin:

Held, the next of kin at the time of testator's death were the persons entitled. *Collisam* v. *Sams*, 421

18, A testatrix directs that the interest of 6000*l.* shall be paid to her son during his life, and at his death one half of the stock to go to the son's *eldest male child living at the death of the testatrix;* the other 3000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without *leaving* issue, then she gave the 6000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain.

By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their chileren:

Held, that in respect to the gift to the *eldest male child* of the son "*living at my death,*" the limitation over by the codicil of the 3000*l.* given to him by the will, is within the rules of law:

Held, that the gift of the 3000*l.* to *the other children* of the testatrix's son, being general, extended to all the children he might *have, either before* or *after her death;* and that the limitation over by the codicil to their children was therefore void. *Arnold* v. *Congreve*, 421

19, An estate can not be limited after an estate to unborn children, 427

20, Where a limitation is to grandchildren generally, it extends not only to those *in esse* at the death of the testatrix, but those born afterwards, and therefore any limitation to their children is not within the rules of law, 427

21, Where a codicil fails by reason of its giving an interest too remote, the will is not affected by the codicil, and the interest of the legatees rests upon the construction of the will only, 427

22, And where grandchildren by a will take an absolute interest, and a codicil made for the purpose of letting in grandchildren having failed, the interest given to the grandchildren by the will, will not be displaced by the codicil, 427

23, A testatrix by her will directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age, they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age leaving issue, such issue to be entitled to their respective parents share, at such time as the parents would have been entitled thereto if living:

Held, that the gift to the children of the sisters was too remote. *Vawdrey* v. *Geddes*, 429

24, A. by his will, in October 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities. There was at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was prior to his death reduced to 3*l.* 10*s.* per cent.:

Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. still existing. *Banks* v. *Sladen*, 454

25, A testator having given by his will legacies to his several daughters, directed that 1000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband,

and the principal should after her death pass and be subject to any will or disposition she might under her hand and seal make thereof, and for want thereof should go to her personal representatives.

The plaintiff married, in succession, two of the daughters:

Held, that the words "personal representatives," mean executors and administrators; that the wife took an absolute interest, and the husband on her death became absolutely entitled.

The marriage with the second sister having been solemnized in Scotland, an inquiry was directed, whether it had actually taken place. *Saberton* v. *Skeels*, 441

26, Gift to a wife, and if she make no disposition of it, then over: Held, an absolute gift. *Bourn* v. *Gibbs*, 457

Bequest of 10,000*l.* provided the legatee attain twenty-one.

In a subsequent part of the will the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated:

Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent.

27, The legatee being a natural child, the testator had no power to appoint guardians for her, but the persons named in the will being well known to the court as proper persons, they were appointed guardians without a reference to the Master. *Mills* v. *Robarts*, 491

28, Bequest of residue upon trust, to pay the dividends to three persons during their lives and the life of the survivor of them; and after their deaths, to transfer the principal to A. B., and if either of them died before his share of the trust money became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor, and when his original share would become payable. A. died in the lifetime of the testator: B. survived the testator and the persons to whom life interests were given. Held, that B. was entitled to one moiety as his original share, and to the other moiety as having survived A., who died without leaving issue of his body. *Humphreys* v. *Howes*, 502

29, Bequest of residue to trustees upon trust for testatrix's brother's children, and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years.

M. was herself one of the children of the testatrix's brother:

Held, that the children born at the death of the testatrix took vested interests:

Held, that the testatrix did not mean to include M. as one of the children of his brother. *Bull* v. *Johns*, 511

30, The testator directed his personalty to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter.

She died under twenty-one:

Held, a vested interest. *Rofe* v. *Sowerby*, 437

31, An heir at law, in answer to a bill to establish a will, admitted that the will was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will, and the sanity of the testator: Held, that the court would not allow him to do so. *Livesey* v. *Harding*, 481

A gift to daughters, and the heirs of their bodies as tenants in common; and if only one, to such only daughter and the heirs of her body, with remainder to the testator's right heirs:

Held, that there were cross remainders between the daughters. *Ibid.*

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